

**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1947**

**No. 366**

**BAY RIDGE OPERATING CO., INC., PETITIONER**

**VS.**

**JAMES AARON, ALBERT ALSTON, JAMES PHILIP  
BROOKS, ET AL.**

**No. 367**

**HURON STEVEDORING CORP., PETITIONER**

**VS.**

**LEO BLUE, NATHANIEL DIXON, CHRISTIAN  
ELLIOTT, ET AL.**

**ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SECOND CIRCUIT**

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# United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT

1

JAMES AARON, ALBERT ALSTON, JAMES PHILIP BROOKS, LOUIS  
CARRINGTON, ALBERT GREEN, JAMES HENDRIX, AUSTIN  
JOHNSON, CARL I. ROPER, MARS STEPHENS and NATHANIEL  
TOLBERT,

Plaintiffs-Appellants,

*against-*

BAY RIDGE OPERATING CO., INC.,

Defendant-Appellee,

LEO BLUE, NATHANIEL DIXON, CHRISTIAN ELLIOTT, TONY  
FLEETWOOD, JAMES FULLER, JOSEPH J. JOHNSON, SHER-  
MAN MCGEE, JOSEPH SHORT, ALONZO E. STEELE, and  
WHITFIELD TOPPIN,

Plaintiffs-Appellants,

*against*

HURON STEVEDORING CORP.,

Defendant-Appellee.

## Statement Under Rule XV.

These companion actions for unpaid overtime, liquidated  
damages and counsel fee under Section 16 (b) of the Fair  
Labor Standards Act were commenced in the United  
States District Court for the Southern District of New  
York by filing of complaints and service of summons and  
complaints as follows:

- (a) Civil Action File No. 33-212 commenced under the  
caption Jeffery M. Addison et al v. Huron Steve-  
doring Corp., by filing complaint and service on  
about October 3, 1945. Plaintiffs Blue, Dixon,  
Elliott, Fleetwood, Fuller, Johnson, McGee, Short,  
Steele and Toppin were originally included among  
the named plaintiffs in the Addison case.



*Statement Under Rule XV.*

(b) Civil Action File No. 33-213 commenced under the caption James Aaron et al v. Bay Ridge Operating Co. Inc., by filing complaint and service on about October 3, 1945. Plaintiffs Aaron, Alston, Brooks, Carrington, Green, Hendrix, Johnson, Roper, Stephens and Tolbert were originally included among the named plaintiffs in the Aaron case.

5 The answers of defendants Huron and Bay Ridge in the respective actions were filed on about November 19, 1945. Both actions were originally representative in character, that is, plaintiffs were "suing in behalf of themselves and all other present and former employees of defendant similarly situated".

By separate stipulation in each case dated June 17, 1946 and approved by the court that day, the respective captions were amended to add numerous additional parties plaintiff; it was agreed that no further plaintiffs would be added to these cases; and the answers previously filed were made applicable to the additional plaintiffs without need for further pleading (Pl. Exs. 1-2 on trial, omitted from transcript pursuant to stipulation). By additional stipulation in each case dated June 17, 1946 and approved 6 by the court that day, the representative character of the action was terminated in each suit, respectively, as to unnamed persons (Pl. Exs. 3-4 on trial, omitted from transcript to stipulation).

By further stipulation in each case dated June 17, 1946 and approved by the court that day (Pl. Exs. 5-6, respectively) the parties agreed as follows:

(a) To sever out the claims of Leo Blue, Nathaniel Dixon, Christian Elliott, Tony Fleetwood, James Fuller, Joseph J. Johnson, Sherman McGee, Joseph Short, Alonzo E. Steel and Whitfield Toppin in Civil Action No. 33-212 against Huron Stevedoring



*Statement Under Rule XV.*

Corp. and proceed to trial upon their claims, leaving pending upon the docket of the court claims of all other plaintiffs in this case.

- (b) To sever out the claims of James Aaron, Albert Alston, James P. Brooks, Louis Carrington, Albert Green, James Hendrix, Austin Johnson, Carl I. Roper, Mars Stephens and Nathaniel Tolbert in Civil Action No. 33-213 against Bay Ridge Operating Co. Inc. and proceed to trial upon their claims, leaving pending upon the docket of the court claims of all other plaintiffs in this case.

The two cases were consolidated for trial by stipulation dated May 14, 1946 and approved by the court on that day and assigned for trial on June 17, 1946.

The parties have stipulated that all of the pleadings may be printed in the transcript of record using the above captions, that is, omitting the names of all plaintiffs except those whose claims were severed out and tried.

Defendants were not at any time arrested nor was bail taken or property attached; no question was referred to a commissioner or commissioners, master or referee.

The consolidated cases were tried together by Hon. Simon H. Rifkind without a jury on June 17, 20, 21, 24 and 25, 1946. Judgment in the respective cases was entered on March 28, 1947 as follows:

- (a) In Civil Action No. 33-212, for plaintiffs Christian Elliott—\$1.46 and Joseph Short—\$.70, together with \$263.18 costs; for defendant Huron Stevedoring Corp. dismissing on the merits the claims of plaintiffs Leo Blue, Nathaniel Dixon, Tony Fleetwood, James Fuller, Joseph J. Johnson, Sherman McGee, Alonzo Steel and Whitfield Toppin, respectively.



*Statement Under Rule XV.*

4b

(b) In Civil Action No. 33-213, for plaintiffs Albert Alston—\$10.28; James Brooks—\$1.86; Louis Carrington—\$4.56; James Hendrix—\$1.20; Austin Johnson—\$3.20; Carl Roper—\$17.00 and Nathaniel Tolbert—\$36.04, together with \$263.18 costs; for defendant Bay Ridge Operating Co. Inc. dismissing on the merits the claims of plaintiffs James Aaron, Albert Green and Mars Stephens, respectively.

5b By notices of appeal filed April 17th, 1947, plaintiffs in the respective cases appealed to the United States Circuit Court of Appeals for the Second Circuit. Those plaintiffs against whom judgment was entered on the merits appealed from the judgment and every part thereof; those plaintiffs who recovered something appealed on the ground that the sums they recovered, respectively, were inadequate and did not represent the full amount to which they were respectively entitled.

Plaintiffs in the respective cases on April 7, 1947 moved for a new trial, for the taking of additional testimony to admit into the record certain additional exhibits, and for corrected and amended findings of fact. The Court on April 14, 1947, denied this motion.

6b The plaintiffs appeared originally by Max R. Simon, Esq., 225 West 34th Street, New York City, and Goldwater & Flynn, Esqs., 60 East 42nd Street, New York City, and defendants appeared by John F. X. McGohey, Esq., United States Attorney for the Southern District of New York, United States Courthouse, Foley Square, New York City, John F. Sinnott, Assistant Attorney General, J. Francis Hayden, Special Assistant to the Attorney General and Marvin C. Taylor, Special Attorney, Department of Justice, of Counsel, in both cases. There has been no change of parties other than as indicated above, and no change of attorneys, since the commencement of the respective actions.



3  
**Summons.**

IN THE  
DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

Civil Action

File No. 33-213

JAMES AARON, ALBERT ALSTON, JAMES PHILIP BROOKS, LOUIS  
CARRINGTON, ALBERT GREEN, JAMES HENDRIX, AUSTIN  
JOHNSON, CARL I. ROPER, MARS STEPHENS and NATHANIEL  
TOLBERT,

Plaintiffs,

against

BAY RIDGE OPERATING CO., INC.,

Defendant.

To the above named Defendant:

You are hereby summoned and required to serve upon Goldwater & Flynn, Esqs., plaintiffs' attorneys, whose address is 60 East 42nd Street, New York 17, N. Y., an answer to the complaint which is hereby served upon you, within twenty (20) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Date: October 4, 1945.

WILLIAM V. CONNELL,  
Clerk of the Court.

(Seal of Court)



10

**Complaint.**

IN THE  
DISTRICT COURT OF THE UNITED STATES,  
FOR THE SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

**I.**

11 Plaintiffs bring this action for and in behalf of themselves and in behalf of all employees and former employees of defendant similarly situated, to recover unpaid overtime compensation and an additional equal amount as liquidated damages pursuant to Section 16 (b) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, Pub. 718, 75th Cong.; 52 Stat. 1060; 29 U. S. C. Sec. 201 et seq.), hereinafter referred to as "the Act"

**II.**

12 Jurisdiction is conferred upon this Court by Section 41 (8), 28 U. S. C. A. (Judicial Code, Section 24), giving the District Courts of the United States original jurisdiction "of all suits and proceedings arising under any law regulating commerce", without regard to the citizenship of the parties or the sum or value in controversy, and by Section 16 (b) of the Act. The Act has been in effect since October 24, 1938.

**III.**

At all times herein mentioned defendant Bay Ridge Operating Co., Inc. has been a corporation organized under and existing by virtue of the laws of the State of New York, having its principal place of business at 34



*Complaint.*

18

Whitehall Street, City, County and State of New York,  
within the jurisdiction of this Court.

## IV.

At all times herein mentioned defendant has been engaged in a general stevedoring business in the Port of New York, in connection with which it has made contracts with ship owners and operators to load or discharge at piers and docks cargoes moving in interstate or foreign commerce from points outside the State of New York to points within the State of New York, or from points within the State of New York to points outside the State of New York, by the use of longshoremen and stevedores employed by defendant and subject to its direction and control. 14

## V.

At all times herein mentioned plaintiffs and other employees similarly situated to plaintiffs have been employed by defendant, subject to its direction and control, as stevedores and longshoremen at piers and docks within the Port of New York, in unloading and discharging cargoes from vessels, moving in interstate or foreign commerce, from points outside the State of New York, and in handling, loading and otherwise working upon cargoes being stowed on board vessels moving in interstate and foreign commerce from points within the State of New York to points outside the State of New York. 15

## VI.

In performing these duties, plaintiffs and other employees similarly situated to plaintiffs have been engaged at all times in operations closely, immediately and essentially related to and constituting a part of interstate and foreign trade, commerce and transportation, and in



16

*Complaint.*

occupations and processes necessary to the preparation, handling and production for interstate commerce of various goods and commodities, within the meaning of the Act.

## VII.

17

Since October 24, 1938, the same hourly rate of pay was regularly paid by defendant to, and actually received by, plaintiffs and other employees similarly situated to plaintiffs for each and every hour of their employment by defendant in each work week, including all hours worked in excess of the applicable maximum prescribed in Section 7 of the Act (44 hours per week between October 24, 1938 and October 24, 1939; 42 hours per week between October 24, 1939 and October 24, 1940 and 40 hours per week subsequent to October 24, 1940).

## VIII.

18

Since October 24, 1938, defendant has at all times failed and refused to compensate plaintiffs and other employees similarly situated to plaintiffs for hours worked in excess of the applicable maximum prescribed in Section 7 of the Act at rates any greater than the same rates which they were regularly and normally paid by defendant for each hour worked during the non-overtime hours (44 hours per week between October 24, 1938 and October 24, 1939; 42 hours per week between October 24, 1939 and October 24, 1940; and 40 hours per week subsequent to October 24, 1940).

## IX.

Since October 24, 1938 defendant has thus employed the various plaintiffs and other employees similarly situated to plaintiffs in interstate commerce and in the production of goods for interstate commerce for workweeks longer than the applicable maximums prescribed in Sec-



*Complaint.*

19

tion 7 of the Act (44 hours per week between October 24, 1938 and October 24, 1939, 42 hours per week between October 24, 1939 and October 24, 1940, and 40 hours per week subsequent to October 24, 1940) and defendant has failed and refused to compensate plaintiffs and other employees similarly situated to plaintiffs for such employment in excess of the applicable maximum in such workweeks at rates not less than one and one-half times the regular hourly rates of pay at which they were employed, in violation of Section 7 of the Act.

20

WHEREFORE plaintiffs pray that judgment be awarded in favor of each of them and in favor of each other employee similarly situated in an amount equal to the difference between the amount each employee has respectively received and the amount each such employee should respectively have received if compensated in accordance with the requirements of Section 7 of the Act, together with an equal additional amount in each case as liquidated damages, or a total of approximately \$500,000; and plaintiffs further pray that the Court allow the costs of this action, together with a reasonable attorneys' fee in the sum of \$150,000, to be paid by defendant in accordance with Section 16 (b) of the Act.

21

Max R. Simon,  
225 West 34th Street,  
New York, N. Y.

GOLDWATER & FLYNN,

By MONROE GOLDWATER,  
A Member of the Firm,  
60 East 42nd Street,  
New York, N. Y.  
Attorneys for Plaintiffs.



22

**Answer.****DISTRICT COURT OF THE UNITED STATES,****FOR THE SOUTHERN DISTRICT OF NEW YORK.****[SAME TITLE]**

The defendant, by its attorney, John F. X. McGohey, United States Attorney for the Southern District of New York, answering the complaint of the plaintiffs herein:

- 23 1. Denies knowledge or information sufficient to form a belief as to the existence of other employees similarly situated to the plaintiffs herein and of the plaintiffs' authority to sue on behalf of all employees and former employees of defendant, similarly situated.
2. Admits the allegations contained in Paragraphs II, III and IV of the complaint.
3. Denies each and every allegation contained in Paragraphs V, VI, VII, VIII and IX of the complaint.

24

FOR A FIRST, SEPARATE AND COMPLETE DEFENSE TO THE CAUSE OF ACTION OF THE COMPLAINT THE DEFENDANT ALLEGES:

4. That the plaintiffs, during the periods of their employment by the defendant, were not covered by, nor within the scope of, or subject to the terms, provisions and conditions of the Fair Labor Standards Act of 1938.

FOR A SECOND, SEPARATE AND COMPLETE DEFENSE TO THE CAUSE OF ACTION OF THE COMPLAINT THE DEFENDANT ALLEGES:

5. That the defendant has fully complied with all the provisions of the Fair Labor Standards Act of 1938 as to all of its employees.



9  
*Answer.*

25

FOR A THIRD, SEPARATE AND COMPLETE DEFENSE TO THE CAUSE  
OF ACTION OF THE COMPLAINT THE DEFENDANT ALLEGES:

6. That any claim or cause of action on behalf of any  
plaintiff for any work week which ended prior to a date six  
years preceding the commencement of this action, is barred  
by the statute of limitations.

WHEREFORE, the defendant demands judgment dismissing  
the complaint, together with the costs and disbursements of  
this action.

26

Dated: New York, N. Y., November 19, 1945.

JOHN F. X. MCGOHEY,  
United States Attorney for the  
Southern District of New York,  
Attorney for Defendant.

By: Louis Mansdorf,  
Assistant United States Attorney,  
Office and P. O. Address:  
United States Court House,  
Foley Square,  
Borough of Manhattan,  
City of New York.

27



## Summons.

IN THE  
DISTRICT COURT OF THE UNITED STATES,  
FOR THE SOUTHERN DISTRICT OF NEW YORK.

Civil Action—File No. 33-212.

29 LEO BLUE, NATHANIEL DIXON, CHRISTIAN ELLIOTT, TONY  
FLEETWOOD, JAMES FULLER, JOSEPH J. JOHNSON, SHER-  
MAN MCGEE, JOSEPH SHORT, ALONZO E. STEELE, and  
WHITFIELD TOPPIN

Plaintiffs,

against

HURON STEVEDORING CORP.,

Defendant.

TO THE ABOVE NAMED DEFENDANT:

30 You are hereby summoned and required to serve upon  
Goldwater & Flynn, Esqs., plaintiffs' attorneys, whose  
address is 60 East 42nd Street, New York 17, N. Y., an  
answer to the complaint which is herewith served upon  
you, within twenty (20) days after service of this sum-  
mons upon you, exclusive of the day of service. If you  
fail to do so, judgment by default will be taken against  
you for the relief demanded in the complaint.

Dated: October 4, 1945.

WILLIAM V. CONNELL,  
Clerk of Court.

(Seal of Court)



**Complaint.**

31

IN THE  
DISTRICT COURT OF THE UNITED STATES,  
FOR THE SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

**I.**

Plaintiffs bring this action for and in behalf of themselves and in behalf of all employees and former employees of defendant similarly situated, to recover unpaid overtime compensation and an additional equal amount as liquidated damages pursuant to Section 16 (b) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, Pub. 718, 75th Cong.; 52 Stat. 1060; 29 U. S. C. Sec. 201, et seq.), hereinafter referred to as "the Act." 32

**II.**

Jurisdiction is conferred upon this Court by Section 41 (8), 28 U. S. C. A. (Judicial Code, Section 24), giving the District Courts of the United States original jurisdiction "of all suits and proceedings arising under any law regulating commerce", without regard to the citizenship of the parties or the sum or value in controversy, and by Section 16 (b) of the Act. The Act has been in effect since October 24, 1938. 33

**III.**

At all times herein mentioned defendant Huron Stevedoring Corp. has been a corporation organized under and existing by virtue of the laws of the State of New York, having its principal place of business at 10 Hanover Square, City, County and State of New York, within the jurisdiction of this Court.



*Complaint.*

## IV.

34 At all times herein mentioned defendant has been engaged in a general stevedoring business in the Port of New York, in connection with which it has made contracts with ship owners and operators to load or discharge at piers and docks cargoes moving in interstate or foreign commerce from points outside the State of New York to points within the State of New York, or from points within the State of New York to points outside the State of New York, by the use of longshoremen and  
35 stevedores employed by defendant and subject to its direction and control.

## V.

At all times herein mentioned plaintiffs and other employees similarly situated to plaintiffs have been employed by defendant, subject to its direction and control, as stevedores and longshoremen at piers and docks within the Port of New York, in the unloading and discharging of cargoes from vessels, moving in interstate or foreign commerce, from points outside the State of New York, and in handling, loading and otherwise working upon cargoes being stowed on board vessels moving in interstate and foreign commerce from points within the State of New York to points outside the State of New York.  
36

## VI.

In performing these duties, plaintiffs and other employees similarly situated to plaintiffs have been engaged at all times in operations closely, immediately and essentially related to and constituting a part of interstate and foreign trade, commerce and transportation, and in occupations and processes necessary to the preparation, handling and production for interstate commerce of various goods and commodities, within the meaning of the Act.



*Complaint.*

87

## VII.

Since October 24, 1938, the same hourly rate of pay was regularly paid by defendant to, and actually received by, plaintiffs and other employees similarly situated to plaintiffs for each and every hour of their employment by defendant in each workweek, including all hours worked in excess of the applicable maximum prescribed in Section 7 of the Act (44 hours per week between October 24, 1938 and October 24, 1939, 42 hours per week between October 24, 1939 and October 24, 1940, and 40 hours per week subsequent to October 24, 1940).

38

## VIII.

Since October 24, 1938 defendant has at all times failed and refused to compensate plaintiffs and other employees similarly situated to plaintiffs for hours worked in excess of the applicable maximum prescribed in Section 7 of the Act at rates any greater than the same rates which they were regularly and normally paid by defendant for each hour worked during the non-overtime hours (44 hours per week between October 24, 1938 and October 24, 1939, 42 hours per week between October 24, 1939 and October 24, 1940, and 40 hours per week subsequent to October 24, 1940).

39

## IX.

Since October 24, 1938 defendant has thus employed the various plaintiffs and other employees similarly situated to plaintiffs in interstate commerce and in the production of goods for interstate commerce for workweeks longer than the applicable maximum prescribed in Section 7 of the Act (44 hours per week between October 24, 1938 and October 24, 1939, 42 hours per week between October 24, 1939 and October 24, 1940, and 40 hours per week subsequent to October 24, 1940) and defendant has failed and



40

*Complaint.*

refused to compensate plaintiffs and other employees similarly situated to plaintiffs for such employment in excess of the applicable maximum in such workweeks at rates not less than one and one-half times the regular hourly rates of pay at which they were employed, in violation of Section 7 of the Act.

41

WHEREFORE plaintiffs pray that judgment be awarded in favor of each of them and in favor of each other employee similarly situated in an amount equal to the difference between the amount each employee has respectively received and the amount each such employee should respectively have received if compensated in accordance with the requirements of Section 7 of the Act, together with an equal additional amount in each case as liquidated damages, or a total of approximately \$300,000; and plaintiffs further pray that the Court allow the costs of this action, together with a reasonable attorneys' fee in the sum of \$100,000, to be paid by defendant in accordance with Section 16 (b) of the Act.

42

Max R. Simon,  
225 West 34th Street,  
New York, N. Y.

GOLDWATER & FLYNN,

By MONROE GOLDWATER,  
A Member of the Firm,  
60 East 42nd Street,  
New York, N. Y.  
Attorneys for Plaintiffs.



Answer.

UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

The defendant, by its attorney, John F. X. McGohey, United States Attorney for the Southern District of New York, answering the complaint of the plaintiffs herein:

1. Denies knowledge or information sufficient to form a belief as to the existence of other employees similarly situated to the plaintiffs herein and of the plaintiffs' authority to sue on behalf of all employees and former employees of defendant, similarly situated. 44

2. Admits the allegations contained in Paragraphs II, III and IV of the complaint.

3. Denies each and every allegation contained in Paragraphs V, VI, VII, VIII and IX of the complaint.

FOR A FIRST SEPARATE AND COMPLETE DEFENSE TO THE CAUSE OF ACTION OF THE COMPLAINT THE DEFENDANT ALLEGES: 45

4. That the plaintiffs, during the periods of their employment by the defendant, were not covered by, nor within the scope of, or subject to the terms, provisions and conditions of the Fair Labor Standards Act of 1938.

FOR A SECOND SEPARATE AND COMPLETE DEFENSE TO THE CAUSE OF ACTION OF THE COMPLAINT THE DEFENDANT ALLEGES:

5. That the defendant has fully complied with all the provisions of the Fair Labor Standards Act of 1938 as to all of its employees.



Answer.

FOR A THIRD SEPARATE AND COMPLETE DEFENSE TO THE CAUSE  
OF ACTION OF THE COMPLAINT THE DEFENDANT ALLEGES:

6. That any claim or cause of action on behalf of any plaintiff for any work week which ended prior to a date six years preceding the commencement of this action, is barred by the statute of limitations.

WHEREFORE, the defendant demands judgment dismissing the complaint, together with the costs and disbursements of this action.

47

Dated: New York, N. Y., November 19, 1945.

JOHN F. X. MCGOHEY,  
United States Attorney for the  
Southern District of New York;  
Attorney for Defendant.

By: Louis Mansdorf,  
Assistant United States Attorney,  
Office and P. O. Address:  
United States Court House,  
Foley Square,  
Borough of Manhattan,  
City of New York.

48



**Stipulation of Consolidation.**

49

**DISTRICT COURT OF THE UNITED STATES,  
FOR THE SOUTHERN DISTRICT OF NEW YORK.**

Civ. 33-212\*

Non-Jury Cal. No. 736

LEO BLUE, et al.,

Plaintiffs,

vs.

HURON STEVEDORING CORP.,

Defendant.

50

Civ. 33-213

Non-Jury Cal. No. 737

JAMES AARON, et al.,

Plaintiffs,

vs.

BAY RIDGE OPERATING Co., INC.,

Defendant.

51

Upon the annexed affidavit of Marvin C. Taylor, and upon the consent of the parties hereto, it is hereby

**STIPULATED AND AGREED** that the above entitled actions be and the same hereby are consolidated for purposes of trial, and it is



52

*Stipulation of Consolidation.*

FURTHER STIPULATED AND AGREED that these cases be set down for trial for June 17, 1946, to be the first cases assigned for trial for that day.

Dated: New York, N. Y., May 14th, 1946.

GOLDWATER & FLYNN,  
Attorneys for Plaintiffs.

JOHN F. X. MCGOHEY,  
United States Attorney,  
Attorney for Defendants.

53

Cases to be assigned to Judge Rifkind.

JNO. C. KNOX,  
5/14/46.

So Ordered

JNO. C. KNOX,  
U. S. D. J.

54



**Testimony.**

55

**UNITED STATES DISTRICT COURT,**  
**SOUTHERN DISTRICT OF NEW YORK.**

[SAME TITLE]

Before: HON. SIMON H. RIFKIND, District Judge.

New York, June 17, 1946,  
 10:30 o'clock a. m. 56

**APPEARANCES:**

GOLDWATER & FLYNN, Esqrs. and MAX R. SIMON, Esq.,  
 Attorneys for Plaintiffs.

MONROE GOLDWATER, Esq., JAMES GOLDWATER, Esq., MAX  
 R. SIMON, Esq. and JOSEPH E. O'GRADY, Esq., of  
 Counsel.

JOHN F. X. McGOHEY, Esq., United States Attorney, for  
 the Government.

MARVIN C. TAYLOR, Esq., Attorney for the Department of  
 Justice, of Counsel. 57

**AFTERNOON SESSION.**

Mr. Goldwater: We have reached agreement, your  
 Honor, on a number of stipulations, subject to the Court's  
 approval: I think they will require very little explanation  
 as we go along.

The Court: Fine.

Mr. Goldwater: The plaintiff will offer most of them.  
 The plaintiff now offers, in the case against Huron  
 Stevedoring Corporation, a stipulation amending the cap-



## Colloquy.

58

tion of the complaint to add certain parties plaintiff. The stipulation is signed by both parties, and is subject to the Court's approval.

The Court: Very well.

Mr. Goldwater: May I, before we begin marking, your Honor, have the great pleasure of moving the admission, at least for the purposes of this trial, of Mr. Marvin Taylor, of the Attorney General's staff in Washington, who has been assigned this case and who is acting as counsel for the District Attorney for the Southern District of New York, who is the attorney of record.

59

The Court: The application is granted.

(Stipulation marked Plaintiffs' Exhibit 1.)

Mr. Taylor: I have been most frequently in the position of being introduced to the court by my opponent. It always has a little flicker of amusement about it.

The Court: He may move to withdraw that before the case is over.

Mr. Taylor: Well, I hope he regrets it.

Mr. Goldwater: I shan't regret it, regardless of the outcome of the case, Mr. Taylor.

60 Mr. Taylor: Thank you.

Mr. Goldwater: I offer now a similar exhibit, amending the caption to add additional parties plaintiff in the case against Bay Ridge Operating Co., Inc., subject to the approval of the Court.

(Marked Plaintiffs' Exhibit 2.)

The Court: Both of these require counter-signature?

Mr. Goldwater: All of the stipulations do.

The Court: All of them do?

Mr. Goldwater: Yes, sir.

The Court: Very well. Proceed.



*Colloquy.*

61

Mr. Taylor: Do I understand that stipulations are being marked as exhibits?

The Court: Well, if they be stipulations of evidence or concessions, it is a convenient thing to have them marked as exhibits.

Mr. Taylor: Very well, sir.

The Court: Because they take the place of evidence.

Mr. Goldwater: I think they should properly be part of the record here, your Honor. I think they become so important and vital a part in any record that it may be probably much better that they be marked as exhibits.

The Court: These particular stipulations that you have now presented are really in the nature of pretrial applications. Are there any objections?

62

Mr. Taylor: I have none; I just wanted to make sure we had not overlooked the point.

Mr. Goldwater: I next offer a stipulation in the Huron case to terminate the character of the case as a class action, subject to approval of the Court.

(Marked Plaintiffs' Exhibit 3.)

Mr. Goldwater: The next is a similar stipulation with respect to the Bay Ridge Operating Co. action.

63

(Marked Plaintiffs' Exhibit 4.)

Mr. Goldwater: Next is a stipulation to sever the actions of certain selected plaintiffs in the Huron case. There are ten plaintiffs selected.

(Marked Plaintiffs' Exhibit 5.)

Mr. Goldwater: Next is a similar stipulation in the Bay Ridge case, with ten selected plaintiffs.

(Marked Plaintiffs' Exhibit 6.)



Mr. Goldwater: I next offer a stipulation in the Huron case as to employment and payment of the selected plaintiffs. In connection with this stipulation your Honor will find photostatic copies of work schedules showing the weeks worked for each of the ten parties selected, the total number of hours for each, total wages for each and the days worked for each, and we have, for convenience of the Court, attached to each exhibit—I should say Mr. Taylor's office has—the name of the particular plaintiff involved, so that the whole matter would be complete on the single sheet.

65

The Court: Fine.

Mr. Taylor: And these schedules of hours worked are in a separate folder attached to the exhibit.

(Marked Plaintiffs' Exhibit 7.)

66

Mr. Goldwater: In connection with Plaintiffs' Exhibit 7, your Honor, I next offer a stipulation, again in the Huron case, which provides that—perhaps I should not offer this as a stipulation for the record, your Honor, but simply state to your Honor that in this connection there is a question of certain statements which we wish to be included in the stipulation, Exhibit 7. We have entered into a stipulation to the effect that Mr. Taylor will cause to be investigated and confirmed the facts which we have stated about the case, as we are informed by the plaintiffs, and that if and when such confirmation is obtained, which will be before the conclusion of the defendants' case, that stipulation, Exhibit 7, just introduced, will be amended in the particular that we have requested, and the paragraph will then be added.

The Court: Very well. We don't need to receive it at this time.

Mr. Goldwater: Not at this time.

Now I offer a similar stipulation to Exhibit 7, but as respects the Bay Ridge Operating Company employees.



*Colloquy.*

67

That is a stipulation as to employment and payment of selected plaintiffs.

(Marked Plaintiffs' Exhibit 8.)

Mr. Goldwater: In the last filed, Exhibit 8, your Honor, there should be added the week's record for the week of Monday, April 17th, of plaintiff Louis Carrington.

The Court: Why don't you physically attach it?

Mr. Taylor: I think it might very well be inserted in the envelope. The point, your Honor, is that we had prepared this stipulation some time back, before we knew that this particular paper relating to Mr. Carrington was to be desired. So rather than amend the stipulation, we have filed it in its original form and are now adding this pink sheet, which falls within the description material of the stipulation. 68

The Court: And the defendants to be bound by that stipulation?

Mr. Taylor: Yes, sir.

Mr. Goldwater: It is now included in the envelope containing all of the material mentioned in the stipulation attached to the exhibit.

I offer now a stipulation in the Huron case, which is entitled "Stipulation of Engagement in Interstate Commerce by certain selected plaintiffs". 69

(Marked Plaintiffs' Exhibit 9.)

Mr. Goldwater: I offer a similar exhibit in the Bay Ridge Operating Company case.

(Marked Plaintiffs' Exhibit 10.)

Mr. Goldwater: That is all we have to offer.

Mr. Taylor: May it please the Court, the defendants have several stipulations to offer.



70

The Court: Are they part of the plaintiffs' case? The only question is whether they should go in at this time.

Mr. Taylor: Perhaps I should state their nature, and then your Honor could say whether you would rather have them now or not. They differ from the stipulations which have just been admitted only in this respect: in each instance the first part of the stipulation concedes the truth of certain facts, or the validity and accuracy of certain documents. It then concludes in each instance with a paragraph in which the defendant reserves all of its rights to object to the admissibility or materiality of the offered material.

71

The Court: Has that material been offered yet?

Mr. Taylor: No, it has not been offered. They have seen it. They have stipulated what is stated to be in the stipulation.

The Court: As fact?

Mr. Taylor: That is right.

The Court: But your turn for introducing the facts has not yet arrived.

Mr. Taylor: That is true, so that I suppose the question before us now is whether or not you would care to discuss the subject matter of the stipulations and make any decision on the question of admissibility in order that if you would care to—

72

The Court: Who would offer them? Are you going to offer them?

Mr. Taylor: I am going to offer them when it comes to my case. As I understand it, the plaintiffs' case—

Mr. Goldwater: The plaintiff has presented its prima facie case and rests.

The Court: All right, I will hear you then on your case.

Mr. Taylor: I have here a stipulation entitled, "Stipulation relating to the New York Collective Bargaining Agreements". It recites that the 30 agreements attached,



by being enclosed in an envelope, are correct copies of all the collective bargaining agreements for the Port of Greater New York, covering the period from May 3, 1916 to date, between the International Longshoremen's Association and the signatory members of the New York Shipping Association, the Deep Water Steamship Lines and Contracting Stevedores of the Port of Greater New York and vicinity. The signatory parties, other than the International Longshoremen's Association, include all members of the New York Shipping Association and the Deep Water Steamship Lines and of the Contracting Stevedores of the Port of Greater New York. All plaintiffs during the period covered by this suit were members in good standing of the International Longshoremen's Association. Then comes a reservation clause, reading as follows:

"The plaintiff reserves all rights to object to the admissibility or materiality of any of the contracts or awards or facts covered by this stipulation."

The Court: All right, you offer it and let us see whether he is going to object to it. Have you offered it?

Mr. Taylor: I do offer it, sir.

Mr. Goldwater: There is an objection. The objection is based upon the ground that the period is entirely too remote; that the complaint covers a period of employment which is within recent years, 1943-1944-1945; that the contract between the union and the employing companies is not binding upon these plaintiffs, nor is it so material a factor in the determination of compliance with the Fair Labor Standards Act as to be admissible because of its irrelevancy and immateriality.

The Court: The ruling on relevancy here might well be dispositive of the issues of this case. As a practical matter I am going to receive it. I want you to state your grounds of objections on the record, and they constitute



*Colloquy.*

in a sense substantive arguments. It will be received and marked.

(Marked Defendants' Exhibit A.)

77 Mr. Goldwater: I understand, your Honor, that the stipulation which Mr. Taylor has read to your Honor and on which we reserve only our rights to object on the ground of inadmissibility and immateriality, has in the folder a document which is a copy of certain minutes of the meeting of the managers of Steamship Lines on July 28, 1887. I would not emphasize again the remoteness of the material which Mr. Taylor is presenting to your Honor. I call it to your attention only for this purpose, not to argue about it, that the stipulation refers to the accuracy of contracts. For the purpose of this record and this case we have agreed that these minutes are included under the general category, the idea being to give your Honor the historical background beginning with these minutes in 1887.

The Court: Very well.

78 Mr. Goldwater: The stipulation is somewhat inaccurate in its description, because this is not a contract but merely minutes of the steamship company's conference.

Mr. Taylor: There is a nice big long gap, though, from 1887 to 1916, so it is not as formidable as it might appear.

The Court: All right.

Mr. Taylor: I now offer a stipulation in the Huron case, which is entitled, "Stipulation Relative to Exhibit 7, Paragraph A." Plaintiffs' Exhibit 7, as the clerk has marked it, is the stipulation offered by the plaintiffs relating to the employment and payment practices of the selected plaintiffs employed by the Huron Stevedoring Corporation. In the form in which that material is presented by Exhibit 7 there are certain columns or lines which have been marked with letters rather than with



descriptive language, and there is no reference whatsoever in Exhibit 7 to the collective bargaining agreement which was in effect during the period covered by Exhibit 7. The effect and purpose of the stipulation which I am now offering is in the nature of a supplement to Exhibit 7, and recites facts which again are admitted to be true, which simply ties in to Exhibit 7 the specific payroll practices and figures which are set forth in the current collective bargaining agreement which your Honor has just admitted.

Mr. Goldwater: The objection is again on the ground 80 that the bargaining agreement is not binding upon these plaintiffs, and it is not material to the issues involved in this action.

The Court: The objection is overruled.

(Marked Defendants' Exhibit B.)

Mr. Taylor: I now offer a stipulation in the Bay Ridge case, which is precisely of the same nature as the one which I just offered in the Huron case, tying in to the stipulation offered by the plaintiffs in this case and entitled "Stipulation Relative to Employment and Payment Practices of Selected Plaintiffs in the Bay Ridge Case"— 81 the terms and conditions of the applicable collective bargaining agreement.

The Court: Same objection; same disposition.

(Marked Defendants' Exhibit C.)

Mr. Taylor: I now offer a statistical table or chart which is entitled "Statistical Analysis of Work Hours of Longshoremen in the Port of New York during the three month periods indicated." It covers the period from 1923 to 1937. It states for the periods covered the total



*Colloquy.*

82

number of man hours worked, the total number of straight time man hours worked, the total number of overtime man hours worked, and then that overtime is split into two parts, one of which is total overtime man hours worked on Saturday afternoons, Sundays and holidays, and the other part is the total overtime man hours and the number of instances involved between 5 p. m. and 8 a. m., exclusive of Sundays and holidays, and that last category is then still further divided, according to whether or not, and if so to what extent, men who worked overtime had worked straight time during the same day. It falls into a group of men who had worked from 6 to 8 hours straight time before working overtime, 4 to 6, 2 to 4, nothing to 2, and ends up with the payroll tables of the number of man hours and instances involved of men who worked only at night, without ever having worked straight time hours during the day.

83

The stipulation, which the parties have signed, and which is attached to this table, read as follows:

84

"It is hereby stipulated that the parties, through their undersigned attorneys of record, subject to the approval of this Court, that the accuracy of the figures recorded on the attached statistical table is admitted. The plaintiffs in all other respects fully reserve all their rights to object to the admissibility of the attached table, on the ground that it is incompetent, irrelevant and immaterial, except that no objection will be made on the basis of the best evidence rule or the rule against hearsay evidence."

The Court: It boils down to this, what is probably plaintiffs' position. This covers a period not embraced within the issues, and on that ground alone it probably would be irrelevant. However, as I see it, it is a little bit different. Assuming that this was not in evidence,



*Colloquy.*

85

but that this table were published in some well-recognized statistical study such as the Statistical Analysis covered by the Department of Commerce, I suppose I would be free to have access to that for general economic information, if I was going to bring to bear upon the decision of this case general economic data. So what you have done is substituted the imprimatur of your stipulation in lieu of the standing and reputation of the authors, and I therefore receive it in that sense. It is really brief material, rather than evidentiary material, for which you have, however, to acknowledge the quality of the material.

86

Mr. Goldwater: I think your Honor has correctly stated our position. The objection primarily, of course, is to the fact that the material covers a period of time which is not embraced within the plaintiffs' claims here, that there is a vast difference between the conditions which are described in this exhibit between 1923 and 1937 and 1943-1944-1945, and that for that reason it is not relevant or material to the issues as your Honor has presented them.

The Court: I will receive it for the narrow purposes for which I have indicated.

(Marked Defendants' Exhibit D.)

87

Mr. Taylor: I next offer a statistical tabulation entitled, "Statistical Analysis of Work Hours of Longshoremen in the Port of New York, from the payroll period nearest November 1, 1938 to the payroll period nearest August 31, 1939." There is attached to this tabulation a stipulation in identical language with the one attached to the exhibit which your Honor has just admitted. The classification of material is precisely the same. It merely covers the period beginning with the first payroll after the enactment of the Fair Labor Standards Act, and runs



88

*Colloquy.*

down to the payroll nearest August 31, 1939, which was selected because we tried to cover the longest period after the enactment of the Act and prior to the incidence of the War.

The Court: It will be received for the same limited purpose, over the same objection.

(Marked Defendants' Exhibit E.)

89

Mr. Taylor: You will see in the lefthand column a series of letters. That is the column headed by the caption "Company". I have supplied plaintiffs' counsel with a list of the names of the 17 companies whose code references are set forth in that column. I have not stated to them which code designations go with which company, except as to the two which are involved in this suit.

90

Now "KA" is the code reference for the Huron Stevedoring Corporation, and "OA" is the code reference for the Bay Ridge Operating Company. The final statistical exhibit which I would like to offer, and which has a similar stipulation attached to it, is entitled, "Relationship of Contractual Overtime to Wage and Hour Overtime in the work of Longshoremen in the Port of New York," from the payroll period nearest November 1, 1938 to the payroll period nearest August 31, 1939. It is based upon reports from the same 17 companies whose code numbers are set forth in the exhibit just admitted. It covers the same period. It differs only in that it presents a different phase of information.

The Court: Same objection and same disposition. It will be received for the same limited purpose.

(Marked Defendants' Exhibit F.)

Mr. Taylor: There is one further matter that perhaps should be called to the Court's attention now, with respect



*Colloquy.*

91

to which the parties are in agreement, and that is as to the steps which should be taken upon the handing down of your Honor's judgment or opinion. We have agreed, subject to your Honor's approval, that the burden of applying to the 20 selected plaintiffs the principles which you may set forth, should not fall upon your Honor; that when you have notified us by an opinion, or however it may be, of the applicable principles, we will then informally, out of court, apply those principles to the actual experience of 20 selected plaintiffs, returning to your Honor with an agreed set of figures for which actual money judgments can be entered. I expect we will be able to agree. It is understood between us that if we run into any difficulties in interpreting your directions, why, we will come back to you, with your approval.

92

The Court: Of course.

Mr. Goldwater: It may become important, although neither of us hopes so, that a Special Master may be appointed, but I think we will be able to avoid that. Neither of us is looking for a picayune advantage.

The Court: I understand you will save me the necessity of doing the bookkeeping. I think that is a convenient arrangement.

Mr. Taylor: That concludes all of the testimony I have to offer today. My understanding is we are to resume on Thursday next.

93

The Court: Yes.

(Adjourned to Thursday, June 20, 1946, at 10:30 a. m.)



*Andrew D. Warwick—For Defendants—Direct.*

New York, June 20, 1946:

10:30 o'clock, a. m.

**Trial Resumed.**

Mr. Taylor: I have some witnesses to be sworn, your Honor. Do you want them all sworn at the same time?

The Court: No, each one in turn.

ANDREW D. WARWICK, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination by Mr. Taylor:

Q. Where do you live, Mr. Warwick? A. 644 Paramus Road, Paramus, New Jersey.

Q. What is your business? A. My business is a contracting stevedore.

Q. What is the name of your company? A. T. Hogan & Sons, Incorporated.

Q. They are stevedores here in the port of Greater New York? A. They are stevedores in the port of Greater New York, yes.

Q. Roughly how long has T. Hogan & Sons been doing stevedoring here in New York? A. About 75 years.

Q. What is your position with the company? A. I am president of T. Hogan & Sons.

Q. Will you tell the Court, please, what your experience has been along the waterfront and in the stevedoring business? A. I came in the stevedoring business 1921. Up until March of 1942 I was actively engaged in stevedoring with T. Hogan & Sons. In March of 1942 I went to Washington as a consultant for the War Department in connection with stevedoring, Army stevedoring matters. I was commissioned a major in the army and served until November of 1945, having technical jurisdiction over the



*Andrew D. Warwick—For Defendants—Direct.*

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army loading of vessels in the United States. After my discharge from the army I returned to T. Hogan & Sons as president of that company.

Q. Are T. Hogan & Sons Company a signatory party to the Collective Bargaining Agreement here in the port of New York with the International Longshoremen's Association? A. Yes, they are.

Q. And in particular they are signatories of the agreement which I now would like to show you. I show you a little booklet bound in a grey cover, entitled "Agreement Negotiated by the New York Shipping Association with the International Longshoremen's Association for the Port of Greater New York and Vicinity, Effective October 1, 1943."

98

Your company was a signatory party of the agreement of which this is a printed copy? A. Yes, we were.

The Court: What exhibit is that a part of?

Mr. Taylor: I am sorry, sir. That is part of Defendants' Exhibit A.

Mr. Goldwater: Defendants' Exhibit A, your Honor, is the group of all the contracts.

The Court: Very well.

Mr. Taylor: And I call the Court's attention to the final paragraph, found on page 15 of the booklet, which says:

99

"This agreement shall be effective from October 1, 1943 to September 30, 1945",

and I think we can agree for the record can't we, Mr. Goldwater, that the claims of the plaintiffs in suit before your Honor fall in that period.

The Court: Well, whatever it is, it is.

Mr. Goldwater: I will say the major part of it is included, practically all, within that period.

Q. I assume, Colonel Warwick, that as a result of your long service with Hogan and the wartime service which



100

*Andrew D. Warwick—For Defendants—Direct.*

you have described, it is fair for us all to assume that you are familiar with conditions all through the port of Greater New York with respect to longshoring and stevedoring? A. Yes, that is correct.

Q. That is, you know as one in your position and with your experience would know, the general conditions and practices which prevail in that industry? A. Yes.

Q. And can you say whether or not this agreement to which I have just referred was recognized and followed throughout the port of New York? A. Yes, it was.

101

Q. And in the same way the agreements which preceded it, year by year, or, in some instances, for two-year periods, were similarly recognized and had portwide application? A. Yes, they were.

102

Q. Well now, I think it might be helpful to his Honor if I asked you a few questions in the nature of background material, so that we may be familiar with some of the lingo of your trade, and let the Court understand how longshoring and stevedoring are done. Perhaps I would ask you first to describe a shape, what a shape is. A. A shape is a gathering of men outside of a pier, at any pier throughout the port, at regular intervals; for instance, at 6:55 in the morning, at 12:55 in the afternoon, and, years ago, at 6:55 at night. The men gathered outside the pier at those hours, and a man employed by the company went out in the group and selected the number of men that he wanted for the particular job, segregating the men into three categories; usually the man picks out the sailors to work on the deck, the hold men for the hold, and the dock men for the dock.

Q. Is that the only method of employment of longshoremen that you have any knowledge of here in this port? A. That is correct, in the port of New York.

By the Court:

Q. Does that mean, Colonel, that if a man appears at 6:55 at a particular dock and stands in shape and is not



*Andrew D. Warwick—For Defendants—Direct.*

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selected, he won't be able to work for the next eight hours because then it is too late for him to go to any other dock to try to get a job? A. No, that is not quite correct. The piers, for example, in the Chelsea section, are so close to each other that a man can walk from one shape to another and be in time; if he misses the shape at one pier, he often catches the shape at the next pier, particularly if they are hiring a large group of men.

I would like to correct; I think I said 6:55 in the morning. It is 7:55.

By Mr. Taylor:

104

Q. Yes. The men who come on are just such individual men as may want to work that day if they are employed?

A. That is correct.

Q. They have no regularity of employment, in the sense that a factory worker might have it: they come down there, offer themselves for employment in the shape and either get it or not, as the event works out? A. That is right.

The Court: They are all members of the I. L. A., or is that not required?

The Witness: Well, they are all members of the I. L. A., I would say, regular men; but in the event that the union men are not available, we have the right to hire men who are not members who may be in the shape. 105

The Court: I see.

Mr. Taylor: I might in that connection read briefly from this agreement which we have been referring to. It says:

"Members of the party of the second part (which is the I. L. A.) shall have all of the work pertaining to the rigging up of ships and the coaling of same



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*Andrew D. Warwick—For Defendants—Direct.*

and the discharging and loading of all cargoes, including mail, ship's stores and baggage. When the parties of second part cannot furnish a sufficient number of men to perform the work in a satisfactory manner, then the party of the first part may employ such other men as are available." That is on page 2 of the agreement.

107

Q. Imagining a man who has been picked out of the shape by the foreman stevedore, just sort of carry him on from there and tell about issuing him the brass check, if you will, please? A. Well, the man is issued a check usually as he goes through the gate, and he is assigned to his place of work, either in the hold, on the deck or the dock, whatever it happens to be, and he proceeds to the ship, if there are two ships on the pier he proceeds to the ship that has been designated for him to work on. The gangs then are usually—the men are usually assembled into gangs, that is No. 1 gang, No. 2 gang, after they come in, to identify the hatch. The ships have six, seven and in some cases more hatches, to identify the hatch so that the man can go back to that place when he returns on a subsequent shift.

108

Q. How long does a man hold his brass check? A. One week. The brass check is held for one week, for the week's pay.

By the Court:

Q. Even though he may only work one day? A. Even though he may only work one day or one hour, he still has a brass check for that hour.

Q. And if he is employed a second day, does he get a new check? A. No, he works on the same check.

Q. Even though he may be on a different ship, or only on the same ship? A. Well, the practice may vary. We



*Andrew D. Warwick—For Defendants—Direct.*

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keep one check for the man, regardless of the number of ships he worked on.

Q. The check had a number? A. The check had a number.

Q. You identify him by that number on your work sheet? A. That is correct.

Q. And your foremen keep track of his time by his number on his brass check? A. Well, the foremen keep track—

Q. Or the timekeeper? A. The timekeeper keeps track of it.

110

By Mr. Taylor:

Q. Well, it is true, is it not, that although the records through most of the week are kept only by the man's brass check number, that at the time of his first employment in any work week, in other words at the time when he is first issued a brass check in a particular week, the timekeeper also makes a notation of his company number or his port number? A. Or his social security number.

Q. Will you explain the port numbers and company numbers to the Court, please? A. Well, in some instances they have a port number, port identification; in some cases they have a company identification; during the war they had a Coast Guard identification.

111

The Court: Some system of identifying the men?

The Witness: Some system of identifying the men.

Q. In other words, to connect up the time record according to the brass check number with the individual man, for the purposes of payment, taxes, social security, war bond purchases and things of that character? A. That is correct.



112

*Andrew D. Warwick—For Defendants—Direct.*

Q. Now the work week covers what period? A. The work week covers from 7 o'clock Monday morning to the following Monday.

Q. And when is payday? A. Payday is usually on Friday, Friday or Saturday.

Q. And is it true that at the time the man is paid on Friday for the week ending the previous Monday, he then surrenders his brass check number for the pay week, upon presentation of his identification card? A. That is correct.

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Q. Will you please tell us what a header is, and a gangwayman and an assistant foreman? A. A header is usually the lead man on either side of the hold gang. In other words, the hold gang is usually divided into two parts. One half of the hold gang works on the offshore of the vessel, offshore side; the other half works on the inshore side. The header is the man in charge of these small groups, usually four men in each group.

Q. How are headers selected? A. Headers are usually selected for their experience, for their ability to handle the small group of men, and their general knowledge of stevedoring and stowing.

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Q. Are they men who are regularly employed by stevedoring companies in that capacity, or are they men who are selected from the men who come out of the shape in order to act as header for the time being? A. They are men selected from the men that come out of the shape.

Q. And is it true that a man may start in or work for a period as a general longshoreman, and then work for a period as a header, and then perhaps during the same week go back to working as a general longshoreman? A. Oh, yes, that is very possible.

Q. And how about gangwaymen? A. Gangwaymen are usually the men in charge of the deck gang, the gang running the winches and handling the falls. He is sort



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of a lead man of that small group on deck, four men or usually four men. He more or less directs the activities of the deck gang in the absence of the hatch foreman or under the orders of the hatch foreman.

Q. And is he like a header in the sense that he is a general longshoreman temporarily assigned to that particular type of additional work? A. Yes, that is correct.

Q. What does the expression "assistant foreman" mean? A. Well, assistant foreman, I think in some cases various companies use "assistant foreman", the title "assistant foreman" in various ways. That may mean assistant foreman to the hatch foreman, or it may mean assistant foreman to the ship's head foreman looking after the ship. 116

By the Court:

Q. What does the term "assistant foreman" mean in the wide sense it is used here in the I. L. A. agreement?

A. The assistant foreman in the I. L. A. agreement I think refers to the foreman on the dock, or dock foreman, as the case may be.

Q. If I remember correctly, one I. L. A. agreement that I once saw had a slightly higher rate of pay for assistant foreman. 117

Mr. Taylor: I was coming to that.

By Mr. Taylor:

Q. Is it true, and has it been true for many years in this port, that longshoremen working temporarily as headers, gangwaymen or assistant foremen received an additional sum of money beyond what they would be paid when working as general longshoremen? A. Yes, that is correct, they do get additional compensation for the additional responsibility.



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Q. And are those additional amounts commonly referred to as differentials or header allowances, or what is the expression? A. We used to call them "heading money" or "gangwaymen money" or "gangwaymen's pay" or "differential"? There are a number of expressions.

Q. How much are they, Colonel? A. They are 5 cents an hour for the headers and gangwaymen, and I don't just recall offhand what they are for assistant foreman.

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By the Court:

Q. What is a "snapper"? A. Well, a snapper is not usually used in stevedoring. I think that is used in shipyards.

Q. Not in the stevedoring business? A. No. I have heard the term used many times, but we have never used it ourselves. We refer to them as this and that.

Q. I had a long trial here once in which the question was whether a snapper was an assistant foreman. They were all referred to as snappers. A. Well, I have heard of it in shipyards many times.

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Q. No, this was on a stevedoring job in the port of Philadelphia. A. Oh, that is quite possible; that is quite possible, because they do in various ports use a different nomenclature than that we use in New York.

The Court: All right.

Mr. Taylor: Now coming back for a moment to the matter of shaping, I have found that the Collective Bargaining Agreement contains various provisions with respect to shaping and also with respect to the times of employment for which a man can be hired at any particular shape, and I would like to call this to your Honor's attention and then ask the witness something about it.



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Under paragraph 8, on page 6, it is provided—

Mr. Goldwater: Still referring to the October 1st—effective October 1, 1943, agreement?

Mr. Taylor: Yes. For simplification of the record, let us have it understood that if I refer to the Collective Bargaining Agreement without any further designation, I am referring to the one effective October 1, 1943, and in effect until September 30, 1945.

Mr. Goldwater: Very well.

Mr. Taylor: Now on page 6 of that agreement, paragraph 8(a) reads: 122

“Shaping Time. Shape at 7.55 a. m., 12.55 p. m. and 6:55 p. m. Men may be ordered out, however, for any other hour, provided that those wanted between the hours of 8 a. m. and 12 noon shall receive notice at 7.55 a. m. shape; those wanted between the hours of 1 p. m. and 5 p. m. or at 5 p. m. or at 6 p. m., shall receive notice at the 12:55 p. m. shape and those wanted for 7 p. m. or later shall receive notice at the 6.55 p. m. shape.

“When men are ordered out for work beginning Sunday morning, they shall be hired on regular gangs at 12 noon on the Saturday preceding. Men wanted for work on a ship arriving on any of the holidays referred to in Clause 2(c) may be shaped only once on the holiday, at 7.55 a. m., at which time they shall receive definite orders whether or not they will be employed during the day or night.” 123

On page 8 of this Collective Bargaining Agreement, paragraph (g) reads as follows:

“When men who have been employed on the premises in the afternoon are re-employed after 7 p. m., they shall receive a minimum of 2 hours pay,



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regardless of weather conditions, unless the ship or hatch on which the men are employed completes discharging or loading in less time. When men who have not been employed on the premises in the afternoon are employed at 5 p. m. or at 6 p. m., they shall receive a minimum of 4 hours pay, such pay to commence at the hour ordered out, whether work begins then or later, except that when work is prevented by weather conditions they shall receive a minimum of 2 hours pay.

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“When men who have not been employed on the premises in the afternoon are employed at 7 p. m. or later, they shall receive a minimum of 4 hours pay, such pay to commence at 7 p. m., whether work begins then or later, except that when work is prevented by weather conditions they shall receive a minimum of 2 hours pay.”

By Mr. Taylor:

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Q. Can you explain to us, Colonel Warwick, the significance and purpose of those provisions which I last read, particularly those which require that you cannot order men to come to work for the first time at night unless you are prepared to pay them or work them a minimum of four hours? Why is that in the agreement?

A. Well, the regular working week of a longshoreman is 44 hours. The regular shaping time in the morning is 7.55. We hire the men at 8 o'clock—to go to work at 8 o'clock, or we order them out for 10 o'clock. It is quite possible that the ship starting, the hour of starting may be 10 o'clock, and take them in at 10 o'clock. Likewise, at the 1 o'clock shape, or 12.55 shape, rather, we either hire the men at that time or we order them at 3 o'clock or 2 o'clock, whichever the case might be. The 7.55 shape, or the 6.55 shape, rather, at night, is the same



thing. We order the men, or rather we shape the men, and we give the men orders for that night, the reason being that the uncertainty of the business gives the contractors an opportunity to determine within a very short time whether or not they want the men for employment at that time.

By the Court:

Q. Well, do I understand that the object of these clauses is to have definite stated intervals at which the men know that they can gather for purposes of employment, and that if you hire them, you can't hire them for trivial periods, you have to take them for a period of time which will at least justify his coming down and shaping up and going home; otherwise he might be chasing around all day and never earn a dime? A. That is correct. 128

By Mr. Taylor:

Q. And with respect to the clauses that I read last of all, if you are asking them to work in the night time you can't do it unless they get at least four hours pay; in other words, you cannot bring them out at night for just a couple of hours if they have not been working during the day? A. The reason for that is that the men have objected very strongly to working at night, they want to work during the daylight hours or the regular working hours, and at 7 o'clock, if they come out, they feel they are entitled to more than they would if they came out during the regular hours of morning or afternoon. 129

By the Court:

Q. So this is intended to discourage— A. This is intended to discourage working hours other than regular working hours.



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Q. You said the regular work week is 44 hours. Can you explain to me just what you mean by these words?

A. Well, so long as I can remember there has always been a reluctance on the part of both the men and the employers and the steamship companies to work other than hours of the regular work day, daylight hours for work, for a number of reasons.

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Q. I understand that, but what do you mean by the words "regular work week is 44 hours"? A. Well, it has always been my understanding, and I am sure the understanding of many, that the regular work week, we all refer to the agreement as the regular work hours of 44 hours.

Q. Is that because the so-called daylight shift, extended over the period of time from Monday morning to Saturday noon, adds up to 44 hours; is that what you mean?

A. That is correct, yes. That is normal working. We always considered it as the normal working day, the same as the office employees consider 9 to 5, or the longshoremen consider 8 to 5 and a half-day Saturday.

Q. And that was the 44 hours? A. As the normal working time.

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By Mr. Taylor:

Q. Will you be kind enough to tell us Colonel Warwick, a little bit about how the ship is worked, that is, how you get the cargo out of the vessel, the sort of tackle that you use?

The Court: Before you go into that, may I ask one more question?

Mr. Taylor: Certainly, sir.

By the Court:

Q. Does it or does it not develop as a practice that any particular stevedoring company, such as T. Hogan &



Sons or Pershing-Hudson or any of the others that are down the street, that over the years they develop a gang of people who work for them rather than for other stevedores, and that those men shape up at their particular piers and that the foreman, or whoever it is for the company who picks these men, knows these men and hires them regularly in preference to strangers who may shape up in the gang? A. Yes, I think that is true. There are a number of men who follow the employment of one contractor or one steamship company, or they may vary in one area, like the Chelsea area; the men may work—I recall we had alternate sailings to Liverpool with the Cunard Line, and men worked on the Cunard Line one week and then worked for us the other week, they confined themselves to that Chelsea area.

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Q. So that you will find, if you look on your payroll, that the same names recur and recur and recur? A. Yes, I think that is—I would not say quite that regularly.

Q. It is not quite that way? A. I think you come to recognize people, because you see them quite often, but they do drift around to suit themselves.

Q. But are there men who, say, do work exclusively for T. Hogan & Sons for many years? A. There are a number of men I would not say have worked exclusively, but have worked very constantly for us.

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By Mr. Taylor:

Q. And is that true as to entire gangs, Colonel Warwick? A. Gangs!

Q. Yes; I mean you have said that there are certain men who may be known, who like to work for this company or that company, or in this area or that area; what I am now asking you is whether or not it is true that there are groups constituting a gang who, as an entire group or gang are repeatedly and recurrently and regu-



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larly hired at the same pier? A. Yes, that is true. We do change them about. They may shift from one gang or another, but there is a certain group of men that follow a steamship company or contracting stevedore.

Q. Well would they necessarily be in the same gang, one day and the same gang another day? A. Well, sometimes they stay in the same gang for quite a while, and then they change it or we change them about for some reason or other. Men drop out of a gang and we fill in, change the men about and fill in the men that drop out of the gang, and that sort of thing.

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By the Court:

Q. What I am trying to ascertain is this, that while it is true that there is a brand new hiring, as you say, at every shape, that that is like a brand new muster in the army every day, but you don't get a brand new army every day. A. No, that is quite right.

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Q. Actually the man in charge of an operation picks himself out 50 or 60 men, if that is what he needs, and he will more or less keep the same 50 or 60 men for the entire operation, and then if he gets another one after that, he may, if the same men show up, keep the same gang all over again. A. A lot depends on the locality. We form new gangs on one of our piers every week; in other words, we do not keep regular gangs, we change the men around, hire men as individuals and make them into gangs, or maybe 50 men work the first week in the month, and 45 of that group work the second week, but in the third week there may be only 30 of that gang there, and we do change them around.

The Court: I see. All right.

By Mr. Taylor:

Q. Now will you tell us a little bit how you work a ship and what a long hatch is, or a short hatch, some-



thing about hoists and tackle and movable equipment and so on. A. Well, ships are rigged pretty much the same. There are new innovations that have come into use in the last 10 or 15 years, but usually there is a boom and a winch to hoist the cargo out. A hatch may have up to six or eight booms per hatch; some of the coastal ships, the liberty ships for example, had two winches and two booms at each hatch, with the exception of the No. 2 hatch, where we had a heavy lift boom in addition to the two light booms, and at No. 4 we had a heavy lift boom. The newer ships, or rather, to identify the ships, the C-2s, have come out with double rigging in each hatch, so that we can put an additional gang in the hatch, instead of working one gang you can work two gangs now, and the cargo is hoisted out with two falls together and slung out and landed on the dock.

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A long hatch usually is a hatch that is larger in capacity than the other hatches of the ship. For instance, the liberty ship a No. 2 hatch was one-third of the total capacity of the ship, and the ship had five hatches.

Q. Isn't the expression "long hatch" also used with reference to the time that it will take to get the cargo out of it? A. Well, the cubic capacity being larger, necessarily it makes it that the cargo and the hours in the hatch would be longer.

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Q. That certainly would affect it, but it would also be affected by whether you are handling, we will say, crated automobiles or innumerable small packages? A. That is correct.

Q. So that all these ideas are embraced in the expression "long hatch", meaning a hatch which, for one reason or another, may take longer to unload than other hatches in the ship? A. That is correct.

Q. Will you tell us about movable hoists or auxiliary hoists or equipment, that is equipment other than that which the vessel carries with her? A. Well, some piers



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in the port of New York are equipped with temporary movable winches, and the winch can be placed in any position, meaning usually on the upper level, although there are some piers that have movable winches on the lower level. The piers are also equipped with what we call a dock span, which is nothing more or less than a heavy I-beam to which we secure blocks used for the hoisting of—to which we run the fall for the hoisting of cargo. By the use of movable or auxiliary winches and the dock span, we are able to put more gangs in the ship than if we used the ship's equipment.

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Q. What relation, if any, have they to the matter of the amount of work done during the normal day and work done during overtime hours? A. If we are able to increase the number of gangs during the normal day in a ship, we can, instead of putting five gangs in the liberty ship, we can put up to eight gangs in a liberty ship and work them during the normal day hours rather than use the overtime or hours in excess of the normal hours.

Q. And in that manner, in addition to others which I will come to later, you seek to avoid as much overtime as you can possibly avoid? A. Yes; that is correct.

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Q. Well now, next I would like to ask a few questions about the nature of the companies doing stevedoring in the port of New York and their relation to the steamship companies. Perhaps you could tell us first in rough percentage, as between stevedoring companies who are independent in the sense that they operate under contracts with one or another of the steamship companies, and the percentage of stevedoring companies in the port who work exclusively or almost exclusively for a particular line? A. Well it is hard to arrive at a percentage but I think there are about seven or eight stevedoring companies doing work for a particular line, in other words doing work for one line. The remainder of the



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companies in the port do work for various lines. Some have one account, others may have numerous accounts.

By the Court:

Q. What is the attachment of the stevedoring company to a particular dock; is there any? A. Usually not to a particular dock; usually they follow the steamship company. The steamship company leases certain piers, and the contracting stevedore follows the steamship company to that pier.

Q. And he uses that pier? A. He uses that pier.

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Q. He does not have to pay rent for that pier? A. No, the steamship company pays that.

Mr. Taylor: What is the nature of the contracts between stevedoring companies and steamship lines?

The Witness: All contracts, with very few exceptions, are on a fixed-price basis.

Q. Meaning what? A. Meaning that the fixed price is for straight time normal work, with overtime differentials specified either in percentage or in a rate per man, or per gang.

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Q. Do I understand, then, that it is a cost-plus arrangement? A. No sir; it is a fixed price per ton or—

Q. Oh, per ton? A. Yes.

Q. I thought you meant per man. A. Well, the overtime differential when we work overtime is usually a fixed price per man, which includes the overtime differential plus insurance and social security taxes.

Q. Let us say you have a contract with the so and so company. Does it provide that you are to get so much per ton of cargo loaded or discharged, or does it provide that you are to get so much per man hour worked, or does it provide that you will get so much if done regular time



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and so much if done through other time? A. The normal commercial contract provides for so much per ton of cargo handled. Now that can be broken down into—we have had contracts as high as 80 commodities—barreled oil; boxed lard and all that sort of thing, but it is all on a price per ton of weight measured.

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Q. And does the contract specify the rate shall be different if done during the day or night? A. The contract is based upon straight time work, and any overtime work is based upon the number of men employed for the overtime operation, and a rate established for the man, which includes no profit but the actual cost of insurance and social security.

Q. In other words, let's suppose that the price on commodity A which you arranged with the steamship company is— A. \$1.50 a ton.

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Q. \$1.50 a ton. Well, it turns out that you do it at night, in which case you then pay him \$1.50 a ton plus a differential, or a different rate altogether? A. No, the steamship company would pay us \$1.50 a ton plus the actual cost of working overtime for the number of men that we would have on the job. In other words, if we had 20 men, they would pay us for the 20 men the overtime differential plus insurance and social security, or actual cost.

Q. In other words, they make up the difference in your cost between regular time and the overtime schedule?

A. We could not give them a rate actually, a fair rate, an equitable rate for overtime, because of the continuing fluctuation.

The Court: I see.

By Mr. Taylor:

Q. I assume it follows that where commercial stevedoring companies may be required to bid in competition with



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one another for the work of a particular line, that the bids are on the basis of the tonnage rates for work during the straight time hours? A. The contracts I have ever seen, with the exception of a few made during the emergency, were all on a fixed price basis, price per ton.

Q. And do the contracts also contain a clause to the effect that the stevedore shall not work men overtime except upon first obtaining permission from the steamship line? A. That is correct.

Q. And were similar clauses inserted in all of the War Shipping Administration contracts during the period of the war? A. Yes, in war shipping also, for army work.

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Q. And in the event that overtime appears, for one reason or another, to be necessary, and the employing steamship line has authorized it, the only amount that the stevedore can add to his bill is what he actually pays out for overtime, plus the accompanying insurance charges? A. That is correct.

Q. He gets no additional profit and no overhead? A. Well, in some cases they do allow a portion of overhead, but the overtime provides for insurance and social security taxes.

Q. Are you able to make sort of a general characterization as to the size of the stevedoring companies in New York, particularly with reference to the cost of labor as one of their elements of operation? What I am trying to get at is if you can tell us how important a part, how large a part of the operating expenses of a stevedore is represented by his longshoremen payroll?

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Mr. Goldwater: I would like to object to that, your Honor, as entirely immaterial and irrelevant.

The Court: Yes, but it is obvious that it must be a very predominant percentage.

Mr. Taylor: Well since it is obvious I won't press the question.



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The Court: From what he tells me, they did not pay rent for their pier space.

Mr. Taylor: That is correct.

The Court: They do not use equipment.

The Witness: Oh, I did not say that.

The Court: Well, does this dock equipment belong to the stevedore or to the pier?

The Witness: The dock equipment belongs to the steamship company, but no one asked me how much equipment a contracting stevedore has.

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The Court: All right, then I withdraw that part of it. You might develop that.

Q. Well, go ahead and tell us, will you? There are no mysteries here.

By the Court:

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Q. I understand you used either the gear on board the ship or the gear ashore on the dock, and I did not understand that you used any of your own equipment? A. Oh, yes sir. Where the cargo lands at the stringpiece we have to have four trucks, cranes, tractors and trailers to move it into position to the place of rest on the dock.

The Court: I see.

The Witness: Now, my own company, our gear inventory is \$300,000 besides any gear supplied by the steamship company.

The Court: All right.

By Mr. Taylor:

Q. There are, are there not, Colonel Warwick, a number of other kinds of employees than longshoremen who, of necessity, have to perform other duties on a ship or on a pier during the time when a ship is loading or unload-



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ing? A. Oh yes, there are a number of employees on the dock that—

Q. Will you name them, please; tell what sort of men they are, what sort of work they do? A. Well, clerks on the dock that handle the clerical work in connection with the vessel's cargo. There are maintenance men on the pier who handle the upkeep of pier equipment; there are watchmen on the pier that watch the cargo; there are a number of employees that keep the pier policed, keep it clean, and a number of employees who do painting work on the ship while the ship is in port, any number of men,

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Q. Yes. Now can you tell us whether those men who work along at the same time as the longshoremen, whether they have a regular day, whether they are employed on a normal day or not?

Mr. Goldwater: I object to that, your Honor, as entirely immaterial and irrelevant, and I think that particularly it is important since the classification of men indicated by the testimony as working along the same time, it becomes obvious from that classification they are not the employees of the stevedoring company.

The Court: Well, let us find out. Are they the employees of the stevedoring company? 159

The Witness: Usually they would be employees of the steamship company.

The Court: Then that is out.

Mr. Taylor: The point of inquiry, your Honor, is merely as part of this whole picture, which I think is important to bring home to you the fact that not only has Colonel Warwick said that in his opinion the normal day is 8 to 5, but that it is also 8 to 5 for all sorts of other operations which go on at the same time on a pier or on a ship. In other



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words, on the broad basic question which is so important in this case, I want to bring in for what it is worth the fact that the waterfront operation, so to speak, very directly related to the handling of cargo, associated with it, is all on a normal 8 to 5 work day, with certain exceptions which I will point out, and which I think are more significant.

The Court: All right. I am not disposed to be too strict on questions of relevance on an issue of this kind. Go ahead and bring out the fact that those employees are not the stevedore's employees, if that is the fact.

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The Witness: That is correct.

Q. And what sort of a day do those men work, Colonel Warwick? A. They work the normal day of 8 to 5, and if, in the event that the ship works overtime, the longshoremen, some of them work overtime, particularly the clerical staff who handle the papers.

Q. But there is a difference, recognized in this Collective Bargaining Agreement—

The Court: Are they embraced within the Collective Bargaining Agreement?

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Mr. Taylor: Some of them are, and I am just going to call attention to it; that is, some of those which were enumerated by Colonel Warwick and which I referred to as an exception to 8 to 5 time.

Q: Now, take the case of port watchmen, for example, the Agreement with whom begins in this little volume at page 33; those men, port watchmen, have to be on the job 24 hours in the day, do they not? A. That is correct.

Q. And the agreement with respect to the men who have to work, for those reasons, 24 hours of the day, is different from the agreement as to longshoremen who have, as you say, a regular day, 8 to 5? A. That is correct.



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Mr. Taylor: I call the Court's attention to page 33, paragraph 2, which reads—this is out of the port watchmen's agreement—"The basic working day"—

The Court: That is a separate agreement?

Mr. Taylor: It is a separate agreement, but contained in this volume. They are all negotiated with the I. L. A. on the one hand and the New York Steamship Association on the other.

Mr. Goldwater: I don't know whether the Court assumes it, but I should state that my objection on the agreement is made to this question with respect to this contract. This is not a contract that affects the workmen who are suing here.

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The Court: This present contract does not.

Mr. Goldwater: That is the contract to which the witness is now being referred.

The Court: I understand.

Mr. Goldwater: And is entirely irrelevant to the issue before the Court.

Mr. Taylor: Paragraph 2, on page 33, reads: "The basic work day shall consist of three shifts of eight hours each, from 8 a. m. to 4 p. m., 4 p. m. to 12 midnight, and 12 midnight to 8 a. m., except that when ships are loading or discharging men may also be employed on an 8 a. m. to 5 p. m. shift, and when working in this category through the noon meal hour shall be paid for that hour at the overtime rate."

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And you find a somewhat similar provision with respect to certain men who are classified as mechanical and miscellaneous workers. The provision with respect to them is found on page 46, and reads:

"Men employed on a weekly basis may be worked on a shift system, 44 hours to constitute a week's



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work, overtime to be paid for any time worked in excess of eight consecutive hours or more than eight hours in any one day."

The men that fall within that classification are men who have to work all day on the job, 24 hours in the day, for obvious reasons.

The Witness: That is correct.

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Q. You are familiar, aren't you, with the fact that if you want to bring a ship into the port of New York and tie it up at a pier and discharge cargo on holidays or Sundays or after 5 o'clock in the evening, you have to get a special permit from the United States Customs authorities to bring her in in those hours? A. Well, I have heard of it, but—

Q. You are not familiar? A. I have actually had little experience with it.

Mr. Taylor: Well I will bring that out, then, from other witnesses.

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Q. You have said that so far as concerns the stevedoring companies and so far, also, as concerns the steamship companies, to whom you must go for authority to work overtime, that you both avoid working overtime as much as possible. You have stated that, haven't you? A. That is correct.

Q. Will you tell us why the steamship companies do not like to have the men work overtime? A. Well, the penalty for working overtime of 50 per cent additional, which actually means a 50 per cent increase in the cost of handling a ship, is one of the reasons. The reason the contracting stevedores do not want to work overtime is that, despite the fact that we get paid for an overtime differential, we are still working on a rate, a straight time rate, and the loss in efficiency working overtime is con-



siderable, so that the penalty attached to working overtime is so great that both the steamship companies and contracting stevedores do not desire to have overtime work other than the regular straight time work.

Q. Will you kindly enlarge a little bit on the reasons why night work is less efficient and why it is more costly to the stevedoring companies who are getting paid only on a commodity tonnage basis? A. Well, it is partially due to the night work. The men are not able to see as well at night handling cargo as they would during the day despite the fact that the lighting is good. The general efficiency of the night operation with respect to the hauling of lighters, of moving lighters about alongside the ship, is somewhat delayed due to darkness, and the men themselves after getting past 12 o'clock midnight, one o'clock, their vitality is low. They just don't produce the same as they would during the normal working day. We are penalized—both the contractors and stevedores and steamship companies are penalized by the fact that the over-all efficiency of the ship is affected by the amount of overtime work performed by that ship.

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Q. And in the case of stevedores who are getting paid on a tonnage basis and who therefore make their profit by turning out as high a tonnage per manhour as possible if you continue on into the night where the productivity of the men is such and you get no allowance for the night work except the actual disbursement, that means it is less profitable for you to work them in the night than in the daytime? A. I would say in many cases it is a difference between a profit and a loss—the number of overtime hours we put in on a ship.

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Q. You said a while back that the men themselves do not like to work at night and have refused to on various occasions. Can you give us some illustrations of that and tell us why they don't like to work at night? A. Well, it has varied with the localities throughout the port. But



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my experience has been that on one pier in particular the men have come openly and said through their dock steward that they didn't want to work overtime or past five o'clock. Other places men said, "To finish a ship if you need us, it is the last night, we will make the concession of working a half night to finish the ship." All during the war at the Army Base at 58th Street, Brooklyn, the men refused to work past 7 o'clock at night. In very few exceptions did we work overtime at the Army Base piers in Brooklyn on ships that were troopships, but on the general cargo ships the men refused to work past 7 o'clock at night, and it was an outright refusal. There wasn't any question about what we thought about it; the men just said, "We won't work."

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By the Court:

Q. They don't show up? A. They show up. They are there during the day.

Q. But on the late shape they don't appear? A. The 7 o'clock shape—if you depend upon getting the men on the 7 o'clock shape you are running a great risk because the men are reluctant to shape at the 6.55 shaping end.

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Q. Where you do work—as you do of course work from time to time—a certain amount of overtime work and then the day gang comes in and looks at what has been turned out during the night you find a little criticism by the day gang—

Mr. Goldwater: I object to that. A certain amount of leading is necessary I will concede in this type of case but I don't think—

The Court: Let him finish.

Q. Well, just as an illustration can you point to any circumstances in the nature of the attitude of the day.



*Colloquy.*

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gangs or men who have worked during the day toward men who have worked during the night? A. Well, long-shoremen that have followed the waterfront for years know approximately how long it takes to discharge a hatch, they know how big the hatch is, they know what a day's work is. In a good many cases where we use men working overtime, bring in extra men to work overtime hours from 7 till 6 o'clock the next morning they just don't produce as much as the day gang would and the day gang will see what the night gang has done and they say, "There is no point in our killing ourselves. If they accept that from the night gang they will accept it from the day gang."

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I think I covered that a short while ago when I said the over-all efficiency of the ship is affected by the men working overtime long hours.

The Court: We will take a short recess.

(Short recess.)

Mr. Taylor: Apropos a question of your Honor's as to the regular or normal working day in the regular or normal work week I would like to put into the record a further provision from the collective bargaining agreement. On page 2 of the Longshoremen's General Cargo Agreement we find this language:

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"The basic working day shall consist of eight hours and the basic working week shall consist of 44 hours."

On page 3 we find this:

"Straight time rate shall be paid for any work performed between 8 a. m. and 12 noon and from 1 p. m. to 5 p. m. Monday to Friday inclusive and from 8 a. m. to 12 noon Saturday. All other time including meal hours and the legal holidays speci-



*Colloquy.*

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fied herein shall be considered overtime and shall be paid for at the overtime rate."

The Court: Let me ask you this. This agreement was made in 1943, was it not?

Mr. Taylor: Yes, your Honor.

The Court: At that time the statute had already come down of 40 hours, had it not?

Mr. Taylor: Yes, sir.

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The Court: Just how is that situation met by this 44-hour schedule? I don't mean how it was solved afterwards. Was there anything in the contract which indicated just how that was intended to be dealt with?

Mr. Taylor: I know of no provision in there to that effect.

The Court: Or was there at that time an assumption that there was no coverage?

Mr. Taylor: No, on the contrary. This provision is an ancient one. At least it was a 44-hour week for some years prior to January 1943.

The Court: Did the question come up during the negotiations?

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Mr. Taylor: Why, I think so. It came up in this way: The 44-hour week and 8-hour normal day had existed prior to F. L. S. A. When F. L. S. A. became effective of course it was also on a 44-hour week.

The Court: That is right.

Mr. Taylor: And the question arose as to whether its enactment required any change in the payment practices which had obtained under the agreement and it was considered by all members of the industry in the port and also by the I. L. A. and unquestionably by a great number of the working men that if the companies continued to pay according to the contract there would be no question that that would be a compliance.



## Colloquy.

The Court: Even though a man would get straight time for 44 hours?

Mr. Taylor: That is what the statute called for in the beginning.

The Court: In the beginning.

Mr. Taylor: Then it was reduced from 44 to 42 hours the practice in the port on the part of the employers was to pay wage and hour overtime for two hours in the event that in the same work week the men had worked 42 straight time hours. And then it went down to 40 hours—

The Court: They did the same thing with the 4 hours? 182

Mr. Taylor: That is right.

The Court: What I am trying to understand is the question of the draftsmanship of this instrument.

Mr. Taylor: They didn't change.

The Court: Apparently they did not sense the conflict or what did they mean? Do you intend to introduce any evidence on that score at all?

Mr. Taylor: I shall, sir.

The Court: I am just curious.

Mr. Taylor: It is a very natural inquiry and the short answer to it is that it was—shall I say—conceded, generally recognized, accepted by employers and employees and men alike that there was a full compliance without the necessity of any change in the contract if men were paid for the extra hours when they followed working 40 straight time hours in the same week and there were never any complaints about it. 183

The Court: There is nothing in the agreement itself drawn in 1943 which says that straight time shall apply to 40 hours and anything above 40 hours shall be paid for at time and a half.



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*Colloquy.*

Mr. Taylor: No; the provision as I read it to you said—

The Court: It just says 44 hours shall be the basic work week.

Mr. Taylor: And that straight time pay shall be paid, which of course at 44 hours would be 3 hours from Monday to Friday and 4 hours on Saturday. Of course in many instances the men received very much more money under the contract than they could have hoped to have received under a strict application of the Wage and Hour rulings.

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The Court: I don't want to go into that. I am confining myself solely to the draftsmanship of this instrument, to what the man did who put down those words, how he intended to solve what appears to be a conflict with the statute.

Mr. Taylor: The chronology of the thing, which you can spell out by looking at the dates when the statute became effective and when it was successively reduced from 44 to 42 to 40 hours, will make it quite apparent that a time occurred when the 42 maximum went into effect at a time when the contract called for 44 hours.

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The Court: I understand that. I am now concerned with the man who put one word next to the other when he made the 1943 agreement.

Mr. Goldwater: I am asking the same question when he drew the October 1, 1941 agreement and when he drew the January 1, 1940 agreement.

The Court: At that time we were on a 42-hour basis.

Mr. Goldwater: Exactly the same language appears right through with complete disregard of the language of the Act.



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Mr. Taylor: Well, of course, obviously. The question in his Honor's mind and what I am trying to point out is that having arrived at the point where we were on a 44-hour basis at the point where the statute says you must pay overtime for 42 hours the company began to pay and that when the 1941 contract expired everyone being satisfied they continued with the language of the old agreement.

The Court: Your suggestion is in effect that the draftsman accepted the clause which had been operating.

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Mr. Taylor: We know as a practical matter when you try to monkey with the language in an agreement you get trouble on your hands. And we find when you go through the list there is a certain typographical pattern followed for a number of years and then you get a change in the pattern. Everybody was perfectly satisfied that everything that was being done was in accordance with the requirements of the statute.

The Court: All right.

Q. During the recess, Colonel Warwick, you have at my request, haven't you, looked at the collective bargaining agreement in order to be able to state definitely whether it does or does not contain any provision for the payment of header, gangwaymen and assistant foremen differentials? A. Yes, I have.

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Q. They are not in there? A. They are not.

Q. They have been paid for a great many years as a matter of custom throughout the port? A. That is correct.

Q. And by that custom the differentials, which are specifically 5 cents, 5 cents and 15 cents, are added into a



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man's pay according to the number of hours that he works in that capacity regardless of whether the hours that he works in that capacity are during the straight time or the overtime hours of the day? A. That is correct.

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Q. Now we all know that a certain amount of work is done outside the normal working day. Will you be good enough to tell us why that occurs? A. Well, when the ship arrives we have some idea approximately of the number of hours that it will require for the discharging of the ship. We break that down into individual hatches. We know what the engagement list contains showing the cargo to be loaded into the ship and we can approximate the number of over-all hours that will be consumed in loading and discharging the vessel. We therefore start off and work the ship to a date which is established by the steamship company as a sailing date or for one reason or another we are told that the ship will work and sail at a certain time. We then start to divide the hours up to determine how many hours other than the normal working hours we will need to discharge and load the ship.

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Q. And you hold that down as low as possible by using auxiliary equipment and any other means that are open to you? A. As a matter of fact in some contracts it specifies that the contractor will use two gangs in a hatch and it even goes so far as to say specifically that he will supply the additional rope falls that lead to the auxiliary equipment on the dock. In other words, to put as many gangs on the vessel during the normal working hours as he can possibly put on the ship.

Q. Is there any difference with respect to overtime as between passenger ships and cargo vessels, freighters and so on? A. Yes, there is a considerable difference.

Q. Would you tell us about it, please? A. Well, the passenger ships are usually set up on schedules published many months in advance. The ships sail at certain times, passengers are ordered down to the vessel for a specific



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time. The passengers would probably come from all corners of the States and outside of the States in some cases and the ship has to be finished to sail at the time specified. It therefore requires that hours other than the normal working hours be used to finish the ship and make it certain that she sails at the date specified. The cargo ship, unless there is a definite commitment to sail a ship at a specific time, two or three hours or six hours or possibly 12 hours, the ship can fall back that many hours and utilize the normal working hours to finish rather than to—to finish at a specific time.

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Q. But whether it is one kind of ship or another you don't work any overtime unless you have to for one reason or another? A. That is correct.

Q. I suppose it must be obvious to all of us that conditions in this port during the wartime were somewhat different from those during peacetime with respect to the volume of work done outside the normal day? A. That is correct.

Q. Can you tell us a little about that and the reasons why, and how extensive the difference is? A. Well, the ships during the war were loaded to capacity. In addition to the below-deck cargo that the normal ship takes there were terrific deck cargoes of vehicles, tanks and all sorts of military equipment carried on deck. The ships were scheduled into convoys, which meant that a certain number of vessels were planned for a specific convoy and the ships had to be worked overtime to meet the convoy date. There was no such thing as delay of two or three hours. Each ship had its specific time to leave the pier and had to leave at that time with the cargo secure. During normal times when the ships were not carrying the cargo, the volume of cargo that they carried during the war, many ships worked without any overtime at all. In other words, the ship with the amount of cargo she

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handled could be completed during the normal working hours without the use of any hours other than the normal working hours. So that a commercial operation was an entirely different operation from what we had during the war.

Q. But it was still nevertheless true that if you did have to work outside the normal working hours you had to get permission from the Government to do so? A. The Government specified in their contracts that permission had to be obtained from an authority to work other than the normal working hours.

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Q. And everything that you have said previously today with respect to the disinclination of the stevedoring companies to work outside the normal hours applies equally during the wartime period? Your contracts were still on a tonnage basis? A. The Army and Navy contracts were on a fixed price tonnage basis. The War Shipping Administration had a cost-plus a fixed fee.

Q. Your company, T. Hogan & Sons, Inc., has paid the men, has it not, who worked for them as longshoremen in accordance with the terms of the collective bargaining agreement? A. Yes, we have.

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Q. And since the hours under the Fair Labor Standards Act were reduced from 44 first to 42 and then to 40 they have paid the men for the hours in excess of the statutory limit at the contract overtime rates when and only when men had worked the maximum permitted number of hours at straight time during the same work week? A. That is right.

Q. Has your company ever had any complaints of that procedure from the union or from any members of the union? A. Not to my knowledge.

Q. Until the suits were brought? A. That is right.

Q. And you yourselves believed and understood that in proceeding in that way you were complying with the requirements of the statute? A. We did.



Q. Now then, is it true that in view of the pendency of this suit and the question now being raised as to whether those payment practices were proper and in compliance with the Act a clause has been written into the current collective bargaining agreement to the effect that if those practices are held to be unlawful by either court decision or by administrative ruling that the contract will be reopened or may be reopened for the purpose of re-negotiating the wage scale?

Mr. Goldwater: Just a moment, please.

The Court: In what agreement are you referring to? 200

Mr. Taylor: The one that is now in effect.

The Court: That is not the one that—

Mr. Taylor: No, sir, that expired on September 30, 1945. The clause which I am inquiring about is something which has been put into the current agreement.

Mr. Goldwater: If your Honor please, your Honor has now been told the fact.

The Court: That is right.

Mr. Goldwater: I object because I don't want your Honor to consider this fact. I think it is entirely immaterial and irrelevant because the issues before your Honor do not concern the period subsequent to the date of the—subsequent to the final date in the contract which your Honor has been hearing testimony on right along. 201

The Court: I might be perhaps a little more explicit as to why I have not been ruling with any degree of strictness on questions of relevancy. I think under the rules now where testimony is objected to on that ground in an equity suit you may nevertheless read or state the evidence on the rec-



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ord for purposes of review, which of course, counsel would invariably take advantage of I assume. Under the circumstances I don't see very much point to disposing of such motions at this stage. Moreover I suppose if I am going to rule on it now I might as well rule on it later when the whole case shapes up so that I can judge as to what turns out to be relevant.

Mr. Goldwater: I understand your Honor's reason for the ruling. The point is that unless I make objection—

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The Court: Oh, I want you to.

Mr. Goldwater: —I shall have no ground on which to raise the issue if your Honor should subsequently decide that it is relevant.

The Court: I welcome your objections because it signals me that here is a question on which there is a question of relevancy. Go ahead. I will allow the answer.

Q. Do you remember the question? A. Yes, I do. It is in this latest contract.

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Q. Do you know whether or not that clause was inserted at the joint request of both the union and the employers? A. I would not say with any degree of certainty that it was on the part of the union.

The Court: Presumably it went in with the consent of both or it would not be there.

Mr. Taylor: I can't really let that pass for reasons of accuracy, your Honor. The present contract is based upon an award.

The Court: I see.

Mr. Taylor: And that is in the nature of a qualification on your observation.

The Court: I see. I am glad to have it brought to my attention.



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Mr. Taylor: I think it is quite true that it was in the award and then thereafter got into the contract at the request of both parties.

Mr. Goldwater: It did not have to be at the request of both parties after the award said it should be in the contract. There was no point in the request after that.

Mr. Taylor: No; request, we will say, of the arbitrator.

Mr. Goldwater: Direction of the arbitrator.

Mr. Taylor: Your witness.

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Cross Examination by Mr. Goldwater:

Q. Mr. Warwick, I have made a note that one of your answers to a question of Mr. Taylor's was to the effect that there is no regularity of employment such as in the case of a factory-worker. A. That is correct.

Q. That is correct? A. Yes, sir.

Q. Well now, is there regularity of employment for a longshoreman that you could compare with any other kind of regularity of work? I mean the work of any other commonly recognized employment. A. I don't recall of any offhand.

Q. Then would I be correct in saying that the time of work of men who were employed as longshoremen is entirely unique, different from anything else that you know of? A. Why, anything else that I know of with the exception of the related work such as shenango work, working along the pier.

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Q. What is shenango work?

Mr. Taylor: Wait a minute. Excuse me, Mr. Goldwater. Please let him finish his answer.

Mr. Goldwater: I thought that he had. He said shenango work and I asked him what is shenango work.



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Mr. Taylor: If he has finished, all right, and if he hasn't—

The Court: Have you completed your answer?

The Witness: Well, it is a casual—

The Court: What Mr. Taylor means is, are there any other comparisons that you wanted to make in addition to shenango work?

The Witness: I can't recall any offhand.

Q. Now will you describe what you mean by shenango work? A. Where men discharge lighters for a lighterage company where the lighter foreman comes out to the pierhead and takes the men in at intervals and hires them to discharge lighters onto the pier. Outside of that—

Q. It is the kind of work, as I understand you, which is performed at the same time and under approximately the same general conditions as the work done by men who work as longshoremen? A. Not actually at the same time. Shenango work could be carried on when there are no longshoremen on the ship at all. They discharge lighters. It is entirely apart from the loading of the ship.

Q. You mean lighters as distinguished from the ships on which the longshoremen work? A. That is true.

Q. And are the men that do that work covered by any union contract that you know of? A. I don't think so.

Q. You don't know of any? A. I don't know of any.

Q. All right. Now you have described generally this business of the shape. Your testimony was that the shape—and you corrected it subsequently— A. The time of the shape.

Q. —was 6.55 and 12.55? A. Yes.

Q. You corrected it to 7.55 and 12.55? A. That is right.

Q. You didn't mean that those were the only hours of shape under the contract effective October 1, 1943, did



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you? A. There were three hours. I mentioned three hours of shape.

Q. Did you? Subsequently? A. Yes.

Q. You first didn't? A. Yes, I mentioned three hours, the regular shaping hours.

Q. And they were—

The Court: 7.55, 12.55 and 6.55 p. m.

The Witness: That is correct.

Q. And I am not sure whether you cleared up this business of the brass check. Do I understand that the man retained the brass check until the completion of the work week? A. Yes, that is correct.

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Q. And that would be so whether he worked one hour, 40 hours or 44 hours or 66 hours in the week? A. Yes. You said one hour but he couldn't very well work one hour.

Q. I didn't mean literally one hour; I meant a considerable number of hours or a substantial— A. That is correct, he held us for the pay week.

Q. Now he got that check when he passed through the gate you said? A. Yes, that is right. In some cases they issue them when the men get down the dock, but the general practice is when they go through.

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Q. It was upon the occasion of his first employment in that work week? A. That is correct.

Q. You said that the men are assembled into gangs very frequently? A. Well, I meant they are always assembled in the gangs.

Q. Oh, they are always assembled in the gangs? A. Let me just clear you on that a little. When the men are hired they are hired as so many deck men, so many hold men and so many gang men. They have to be assembled into gangs because you need so many deck men, so many hold men and so many gang men to discharge one cargo for the complete operation.



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Q. How many men are there in total in a gang? A. 20 men excluding drivers of mobile equipment.

Q. They are not considered in the gang of longshoremen? A. No. There are 20 men in a regular gang.

Q. The drivers of mobile equipment haven't anything to do with the longshoremen's contract that you have been talking about here? A. No, that is correct.

Q. Now you said there are various identification methods for the men by company number and otherwise. A. That is correct.

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Q. And that those methods might vary with the companies? A. That is correct.

Q. But there is one identification method that is uniform, is there not, and that is the Social Security record of the man? A. That is correct.

Q. And so by reference to the man's Social Security record which you must or the company must accurately keep you can always determine how many hours the man worked in any work week? A. Yes, that is true.

Q. And what the hours were in the work week that he worked? A. You mean to differentiate between straight time hours and overtime hours?

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Q. Yes. You must necessarily differentiate when he was paid a different rate for different hours, isn't that so? A. That is right.

Q. And your Social Security records would indicate that accurately? A. Yes.

Q. Your pay day was Friday for the previous week's work? A. That is right.

Q. And you say the work began on Monday and continued till the following Monday? A. That is true.

Q. You would then include Saturday and Sunday in a normal work week? A. Not in a normal work week, no.

Q. You would not? A. You would include seven days, but the normal work week would be five days and four hours on Saturday.



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Q. Why did you say then that the work week continued from Monday till the following Monday? Those were your words. A. The records continue but the normal work week does not change with the record.

The Court: In other words, if a man did work on Saturday that would be applied to the preceding week and not to the succeeding one?

The Witness: That is right.

Q. And I suppose it follows then that what he was paid on Friday the Saturday or Sunday work was included as part of the pay of the preceding week? A. Well, it would be included in the total of the preceding week. 218

Q. Yes. Did he get a pay envelope with a record of the time worked by him? A. Yes. I say yes. We paid them that way; I am not quite sure—

Q. Well, we talk of your company now. A. Yes.

Q. Did you show specifically the hours worked in the day and the hours worked at night on the record you handed the man with his envelope? A. We show the daytime hours and the overtime hours, yes.

Q. And did you show which of those were on which days? A. No, I don't think so. I think we totalled the hours. 219

Q. Just the total number at straight time pay and the total number at overtime pay? A. We may break it down. I am not sure of that. But we do segregate the straight time hours from the overtime hours.

Q. Would you show straight hours at so much pay and what you call overtime hours? A. That is true.

Q. And those overtime hours I assume follow the contract provision? A. Yes.

Q. In other words, every hour worked by the man after five o'clock at night whether it covered the meal hour be-



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tween 6 and 7 or the hour between 5 and 6 or period after 7 at night was considered overtime hours? A. Yes. Well, the meal hour is a penalty hour.

Q. I beg your pardon? A. The meal hour is a penalty hour. You referred to that hour as overtime.

Q. Well, he was paid at what was called the overtime rate in the contract? A. That is correct.

Q. You did not distinguish on your statement to the man whether it was meal hour or any other hour? A. That is correct.

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Q. It was merely an hour at overtime rate? A. That is right.

Q. And in the description of the pay, so many overtime hours, there was no differentiation as to whether a man started at the night shape-up, 6.55, or whether he had started at the morning shape-up at 7.55, or whether he had started at the noon shape-up at 12.55? A. No, it shows the total hours. There is no other record on there to indicate what other hours he worked.

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Q. In other words, the hours of overtime for which you paid when you gave him his envelope and the statement were the same and the statement was the same, whether the overtime hours paid for were two hours after day work or whether they were all hours worked after 6.55 shape-up at night?

Q. (Read.)

Q. Do you understand the question? A. I think I understand it. In other words, the envelope just indicates the total number of overtime hours and the total number of straight time hours. It would not indicate anything other than that.

Q. Well now, you have described for Mr. Taylor what is meant by a header and by a gangwayman, do I understand that the header and the gangwayman both worked along with the men? A. Oh yes.

Q. They did exactly the same kind of work as the men



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in the gang who they headed? A. They did the same work and they directed a small group.

Q. But they did the same amount of physical work as those men, or were expected to do the same kind of physical work? A. Yes.

Q. In other words, they were not paid for supervision alone? A. They were paid a differential for the supervision.

Q. Yes, but not for supervision alone? That is not what they got, either \$1.25 plus the differential or \$1.87½ plus the differential? A. No.

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Q. Now, Mr. Taylor read into the record the provisions of paragraph 8A of the agreement effective October 1, 1943; which appear on page 6, and asked you questions concerning it. That is the paragraph that describes shaping time at 7.55 a. m., 12.55 p. m. and 6.55 p. m. The second sentence is, "Men may be ordered out, however, for any other hour." That is followed by, "provided that those wanted between the hours of 8.00 a. m. and 12 noon shall receive notice at 7.55 a. m. shape," and so forth. Now, let me ask you whether a man who worked what you have described as the normal day period of work from 8 a. m. to 5 p. m., would normally be told at the mid-day shape that he was needed for an extra hour or two after 5 p. m.? A. No, he would not. The general practice is he would not.

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Q. He would just be carried over for an extra hour or two, that is, towards the end of the day? A. That is right.

Q. The foreman would say, "Everybody stay an extra hour or two or finish 6.30"? A. It would depend on the conditions at, say, 4.30, as to whether or not they continued past 5 o'clock.

Q. Suppose a man worked during the day, working during the day was wanted at 7 p. m. or later, when would he be told? A. If he worked until 5 o'clock he



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would be told at 7 o'clock. He would be told to shape up 7 o'clock.

The Court: He would be told to shape?

The Witness: Oh, yes, sir, we have a right to shape at 7 o'clock. The conditions that might exist between 5 and 7 might be such that for any number of reasons we could not start up, although we planned to start at 7 we could not start. So the man is told to shape at 7 o'clock. We have a right to shape the men at the 7 o'clock shape.

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Q. Are you distinguishing now between telling the man definitely to work at 7 or telling the man only to shape at 7? At 5 o'clock we would tell him to shape at 7, but at 6 o'clock if he went to supper at 6 o'clock we would say to be back at 7 or shape at 7 o'clock. In other words, if the man worked until 6 o'clock or 5 o'clock we delayed telling the men as long as we possibly could due to the conditions that existed, as to whether or not we could use them at 7 o'clock.

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Q. Do you distinguish between telling him when he goes out to eat under those circumstances at 6 o'clock as you describe, do you distinguish between telling him to work at 7 or shape at 7? A. Yes, there is a very definite distinction. The distinction is if you say or order the man back at 7 o'clock you are giving him a definite order to come back and work at 7 o'clock. If you say shape at 7 o'clock, you tell the man to shape at 7 o'clock, at the 7 o'clock shape, and then you decide between the hours of 5 and 7 or 6 and 7 whether or not you want to use the men at 7 o'clock.

Q. Why wouldn't you know at 6 when the men were going out, why wouldn't you know then that you did or not need them at 7 o'clock? A. For a number of reasons. It might come on to rain. The cargo, we would be given instructions that the cargo would arrive at 6



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o'clock, between 6 and 7. We would make our plans based upon that. The cargo for some reason or other didn't arrive. The power of the ship might go off between 6 and 7 for some reason or other. There are any number of things that could happen which would stop us between the hour of 6 or 7 from being in a position to actually put the men to work at 7 o'clock.

Q. Would you say that all those things, Mr. Warwick, were reasons which affected the regularity of the men's employment? A. I think all of those reasons do affect the regularity.

Q. You have described the formation of the men into gangs and you have said that because of the conditions you described men worked at night where it was necessary to finish a job, is that right? A. To finish a job or to handle the work at hand, or some reason or other.

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Q. Did they ever start to work at night or work at night to start a job? A. Oh yes, that is quite possible.

Q. So that what you have been talking about as overtime is to be understood as restricted to hours worked by the men after they had worked, or only worked by the men after they had worked just straight 8 hours during the day? A. I do not quite understand the question.

Q. Mr. Taylor has asked you a number of questions and has asked about the term overtime, and you have answered his questions and in doing so used the term. Now, when you used that term do I understand that you were applying it only to hours worked by men who had worked previously during the day? A. Oh, no, I apply it to the regular working day.

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The Court: You mean the time and a half period, whatever it happens to be, as used in the I. L. A. agreement, which means non-regular day-time work, whether it is the beginning, middle or end of an operation, whether it is the commence-



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ment of the work for this particular man or the conclusion of the work for this particular man?

The Witness: That is right, it may be a passenger ship that would start up for some reason or other at 7 o'clock, starting to work at 7 o'clock at night. It is quite possible. There are exceptions to the rule.

Q. Is the passenger work starting to work at 7 o'clock at night exceptional? A. I would say so, oh, yes.

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Q. How many times have you known it to happen in your career? A. We have handled the larger ships, the Majestic, Olympic, Manhattan and Washington, and I would say that it was an exception when we started a ship at 7 o'clock at night.

Q. What about exclusive cargo ships? A. Cargo ships we usually start during the normal working hours between 8 and 12. As a matter of fact, a cargo ship arriving in Quarantine in the early afternoon would be held out until the following morning so we could start it at 8 o'clock in the morning.

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The Court: During the summer before the war when you had a very rapid turnover of the transatlantic liners moving on fast schedules, you had to work whenever the occasion occurred?

The Witness: The fast liners take very little cargo, and although there were certain times we did work overtime we were able to confine that considerably to normal working hours.

The Court: Did they discharge mail?

The Witness: Mail, baggage, and usually express cargo.

Q. Now, Mr. Warwick, where a man started to work at 8 o'clock in the morning it did not necessarily follow that



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he would work 8 hours, that is, from 8 to 5, less lunch that day, did it? A. No, he could be knocked off at 12 o'clock.

Q. He might work four hours? A. We try to keep it in four-hour groups if we can.

Q. But even that did not always happen, did it? A. That is correct.

Q. He might work only two hours? A. That is correct.

Q. Or he might work six hours? A. That is correct.

Q. Might that also not be true of men who started to work at night? A. What is the finish of your question?

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The Court: That they only worked two, four or six hours instead of the regular eight hours.

The Witness: Oh, yes, sir, they could work four hours. If we had to work overtime we tried to cut it off at 11 o'clock, if the men started to work at 7 o'clock.

Q. But there is no regularity about that practice, is there? A. There is no regularity about the whole industry.

Q. Might it not also be true, or don't you know it to be the fact, that men who worked in gangs beginning at 7 o'clock, were at the end of their night work told to report back as a gang the next night? A. The chances are it did happen, but there was no reason for it to happen, because they had a 7 o'clock shape that night which they could very well tell the men to shape for. If they did it I think it was being a little generous on the part of the employer to do it. He did not have to do it under his agreement.

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Q. He did not have to do it under his agreement, but he had men who had been working for him in groups and tried to retain the same men, although as you said



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there was no regularity about that either, but as a general thing a man who was satisfied with his employer would report back to him, to the same employer, and try to get a job from him, wouldn't he? A. That is quite right.

Q. That was a natural thing? A. That was a natural thing.

Q. And it would also be natural for an employer when he had a gang that worked together well, to keep the same gang together? A. Yes, I think that is right.

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Q. You would get most efficiency that way? A. That is right.

Q. And if you knew that you had a cargo that was going to take six or seven days that you had to unload, and you had a specified time, as you said, you try to estimate the time when the cargo was first displayed, and you knew when the sailing time was for the ship, you could tell pretty well whether you needed a night gang to work three or four or five nights in succession, couldn't you? A. No.

Q. You could not even tell that? A. You could not tell that, because you cannot tell when it is going to rain, for example.

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Q. That, of course, is a contingency nobody could count on? A. It is true of the cargo too. For instance, you may get a promise from the railroad to deliver a cargo at a certain time, but that is only a promise and it may not materialize. That was the reason why the employers wanted a 7 o'clock shape, as a matter of fact.

Q. Is that indefiniteness of delivery by railroad of a cargo another one of the things that make the irregularity in this employment? A. It is one of the contingencies we have to contend with. There is no question about that.

Q. It is a fact that you do not get performance as per promise because of a number of things? A. That is quite true.



Q. And that conduces to an irregularity of employment, doesn't it? A. It is irregularity for periods outside of the normal day, but you can confine it pretty well because after all we have three shapes and we only have one shape at night. If we make a mistake at the night shape, why, it means the whole night, but where we have a shape at 8 o'clock in the morning and at one o'clock we can gauge our work to within an hour, just the span of the meal hour.

Q. It is not really accurate to say that if you make a mistake at night that it affects the whole night, is it?

A. It affects it that you cannot get the men back; for instance, if the cargo was not delivered until after you knocked the men off at 10 o'clock, if the cargo is delivered at 12 o'clock at night we cannot get the men until the next morning at the 8 o'clock shape.

Q. But if you started the men after the night shape, that did not mean they were employed the whole night?

A. Oh, no, no.

Q. The very irregularity and indefiniteness of deliveries of the cargo, and these attempted determinations of periods for removal of cargo or placement of cargo, in order to comply as nearly as you could with the company's sailing date schedules, those were the things that induced the creation of shapes in all the contracts here, isn't that so? A. Well, that contributed to a part of it. There is no question about that.

Q. What else was there that induced the companies in their dealings with the men to have shapes three times in 24 hours? A. It gave them the opportunity to plan their work, plan the work in connection with the delivery of cargo. The delivery from the railroad is only part of the delivery of cargo. The delivery of truck cargo, for instance, at 8 o'clock in the morning, you would not know just how much truck cargo you might expect during the morning or the afternoon.



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Q. That is another indefinite factor? A. There is a certain degree of definiteness about the business. There is no question about that, that we can control within the normal working hours, but there are many things that we are dependent upon to be partly executed in order to load the ship.

Q. Is one of the things that you cannot control the tides?

A. I am quite sure it is.

Q. It has some effect on this business, hasn't it? A. Yes.

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The Court: It is one thing, however, you can forecast with a great degree of accuracy?

The Witness: That is right.

Q. But you cannot tell whether the ship is coming into port in time to catch the tide coming in or not? A. With some of the large ships they try to make the tide, high water slack, to dock.

Q. Of course, they always try but they are not always successful? A. They are not always successful, but they—

Q. And that fluctuates whether you want men at a certain shape or not, doesn't it? A. Oh yes.

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Q. Fog is something that you cannot control either, isn't it? A. That is quite true, but they have made progress, though, with radar.

Q. In forecasting, of course. That is not always accurate? A. The forecasting?

Q. Yes. A. I thought you meant radar. I said they had made progress with radar.

Q. I am sorry, I did not hear the end of your answer. You mean with radar? A. Yes.

Q. That is a rather recent development? A. During the war it was very successful.

Q. But it is recent with respect to the history of this industry, isn't it? A. That is right.



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Q. Would you say that the number of hours worked by employees weekly varied greatly? A. Well, I think you could break it down into groups.

Q. Suppose you do it, Mr. Warwick, and answer it any way you think is proper. A. It does vary very greatly, but there are a certain number that would average more than others. There is a nucleus that probably would average more than others, but there is probably a great deal of irregularity.

Q. When you talk about a certain number that would average more than others, you mean those who are the old standbys with the company and would get the first selection of work when it was available? A. No, I mean the ambitious fellow would probably do all right. Those who are satisfied to work two days a week will only get two days a week.

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Q. You do not mean by that, do you, that the number of hours worked depends solely upon the wishes or the will of the men, do you? A. No, it depends entirely upon the business and the availability of work.

The Court: During the war you had a shortage of men and anybody that wanted to work could always get a job?

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The Witness: That is true, and that was due to the number of men who handled explosives. Quite a number were taken out of the longshore business, and the Army took quite a few.

Q. You are quite clear, are you, that not only did the companies object to the men working at night but the men themselves always object to it? A. I would not say that. You say "always."

Q. I am sorry, I did not mean to put the word "always" into your mouth, but the men generally object to it? A. I would say that the men I have had contact



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with, those that did not want to work at night were as many as those who wanted to work.

Q. I got quite a different impression from your answer now, and I am sure anyone in the courtroom would. Perhaps we misunderstood you in your answers to Mr. Taylor's questions. I got the impression before that you were trying to convey the idea that in general the men objected to night work as much as the companies. A. Yes, I think is true.

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Q. Is that so or is it just as many men are willing to work nights as days? A. No, I think that is absolutely true.

Q. Which is it? A. The statement I just made in answer to your question is true, that the men generally object to night work.

Q. Do you know whether from your contact with the industry and your knowledge of the history of the industry, which goes back pretty far, do you know whether that has always been generally true? A. Yes, sir.

Mr. Taylor: You bring in that word "always." It is a pretty big word.

252 Q. Has the generality of your statement been true as far back as you can remember? A. Yes, I think it has.

Q. I would like to refer you to the subject of the regular work week being 44 hours. Do you know how far back you would say the regular work week was 44 hours? A. As I recall I think it was around 1920.

Q. You were in the business at that time, were you? A. I came in in 1921, but I did work during the summer months back as far as 1918.

Q. I would call your attention to the fact that one of the exhibits would indicate that during the period October 1, 1921 to September 30, 1922, the week was described as a 48-hour week. A. That is quite possible. I know it was back quite a ways.



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Q. And from 1922 to 1923 again it was a 48-hour week? A. That is quite possible.

Q. From 1923 to 1924 again a 48-hour week. Is your recollection refreshed at all? A. No, that is quite a long ways back. I would not be a bit surprised.

Q. The same was true for the period 1924-25, 1925-26, and it first became a 44-hour week in the period for October 1, 1926? A. That is quite possible. I said it was a long time ago. It is 20 years ago, after all.

Mr. Taylor: You say 1926?

Mr. Goldwater: Yes, October 1, 1926, to September 1, 1927. 254

Mr. Taylor: That is pretty close to 20 years.

Q. Did you say you did some work in the industry in 1918? A. I said I worked in the office during my summer vacations.

Q. Did you have anything to do with time sheets during that time? A. We saw the time sheets come into the office, but it was entirely different.

Q. You do not recall that the period of October 1, 1918 to September 30, 1919, it was a 40-hour week? A. No, I am sorry.

Q. You do not remember? A. No.

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The Court: That is the close of the war period.

Mr. Goldwater: It was after the war.

The Court: The contract was dated around October 1918.

Mr. Goldwater: October 1, 1918.

The Court: So it was negotiated before the war was over?

Mr. Goldwater: That is not always so.

The Court: It might have been retroactive?

Mr. Goldwater: They very, very frequently are in my experience.



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The Court: Well, I guess you are right.

Q. On the difference between what is called straight time and overtime in this contract, Mr. Warwick, has it always been that overtime represented exactly one and a half times straight time?

Mr. Taylor: Are not the agreements the best evidence of that?

The Court: He might test his memory and credibility.

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Mr. Taylor: For that purpose I do not object.

A. My memory is not too good. I always refer to the agreements. I would not want to guess at it.

Q. Do you also know whether the night work time, the rate paid for that time, was always called overtime?

Mr. Taylor: I think the same objection goes.

The Court: The same disposition. He may answer. Do you know?

The Witness: No, sir, I do not. I would not want to speculate on it.

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Q. You have said, Mr. Warwick, that the contracts which were made with the shipping companies made provision for the overtime differential? A. Yes.

Q. You have said that while the contracts called for a definite price per ton you could not give a fair rate with overtime work included? A. That is correct.

Q. And you have said that that was because of the fluctuation or variation in overtime work? A. That is correct.

Q. And by that overtime work I now understand you to mean because there might be night work as well as an hour or two or three of what might be called straight



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overtime, overtime coming after straight hours employed during the day? A. I did not quite get your question, I am sorry.

Q. (Read.)

Mr. Taylor: May I plead as being a person who has not enough intelligence to understand that question.

The Court: That would not be of importance. It is the witness. Does the witness understand it.

The Witness: I think you are trying to draw a differential—

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The Court: Do you understand the question?

Q. No, I am not trying to differentiate. I am trying to ask you whether you try to differentiate. A. I am sorry, I cannot answer the question.

Q. Let me try to do it again so that even Mr. Taylor will understand it. Do I understand you now to say that the fluctuation or variation which made it impossible for you to give a fair rate on a job on a straight tonnage basis, was a fluctuation or variation which included work nights only as well as overtime following day work? A. I am awfully sorry, but I do not quite understand.

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The Court: You do not draw any distinction between night work per se and night work which follows day work?

The Witness: No, sir, we do not. It is in excess of the normal working day.

The Court: In excess or is it at another time then?

The Witness: It would be another time if it was in excess of the normal working day.

Q. But it might be at another time when it was not in excess of the man's day work?



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Mr. Taylor: What he means by excess is outside obviously.

The Court: That is what you mean?

The Witness: Yes, sir.

The Court: It is the fact that the work and the time of the clock differ from 8 to 5?

The Witness: Yes, sir.

The Court: That is what determines?

The Witness: Yes.

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The Court: It does not make any difference whether he worked before he started his night work or whether he was asleep before he started his night work?

The Witness: That is right.

Q. You said that the contracts with the shipping companies provide that there shall be no overtime work without first obtaining permission of the shipping companies?

A. That is correct. I think I said contracts that I saw.

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Q. Well, of course, we are referring only to those that you know about. I would like to ask you with respect to that how you got your authorization, what time of the day you got your authorization, for night work. A. It varied. It usually came, if we were to continue after five o'clock, we usually got our authorization about four o'clock, between 4 and 4:30, if we were to continue on with the overtime work.

Q. Did you determine then at that time whether you were going to keep the men who were working days for two or three hours, or whether you were going to start a new gang at the shape at 6:55? A. It went back a little farther than that. It depended on whether or not the men were shaped at 7 o'clock that night. If we had men told to shape at the 7 o'clock shape, and we thought that they might be employed for longer than half a night,



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we in some cases put on additional men or new men at the 7 o'clock shape, but if we worked through as we did many times, the men referred to work through until 7 o'clock, and then go home rather than come back at the night shape, which we did many times.

Q. Did you ever work through to 7 o'clock and then start the men again at 8 o'clock, the same men, and work through the night? A. We might have once or twice, but it was a very rare exception.

Q. You are speaking now of your own company? A. That is correct.

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Q. You do not know whether that was done by the Huron Company? A. No.

Q. Do you know whether or not it was done by the Bay Ridge Company? A. No, I would not know that either.

Q. Your attention has been called to the contract of the port watchman which you find in the exhibit which Mr. Taylor handed you? A. Yes.

Q. You have it before you? A. Yes.

Q. Your attention was specifically called to the provisions of 2 and 3, which appear on pages 33 and 34. 2 provides that the basic working day shall consist of three shifts of 8 hours each. There is no equivalent provision in the longshoremen's agreement, is there? A. No, there is not.

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Q. 3-A provides for a fixed dollar rate for an 8-hour day for watchmen and for gatemen and for roundsmen, does it not? A. That is what it says here.

Q. Is there a fixed daily rate for men in the longshore work? A. There is a first straight time rate, yes.

The Court: Hourly rate?

Q. It is not a daily rate, is it? A. No, it is an hourly rate.



Q. Is there a provision in the port watchmen's agreement for knocking off? A. I do not know really. We do not handle watchmen.

Q. Do you know of your own knowledge whether there is any provision or whether there has ever been a practice of shape-up three times a day for port watchmen? A. I would not know that. We do not employ watchmen.

Q. In the general cargo agreements there is a provision that men shall work any night of the week, is there not? A. Yes, there is.

Mr. Taylor: Why don't you direct his attention to it and the Court's also.

Mr. Goldwater: It is in paragraph 2-A on page 2. I am sure the witness knew that without having his attention directed to the paragraph.

Mr. Taylor: I was not sure that you did.

Mr. Goldwater: You were not sure I did? I was reading from it. It was in my hand.

The Court: All right.

Q. Do you know why that provision was inserted in the contract? A. I think I know, yes.

Q. Suppose you tell me why you think that there was such a provision there? A. I think it was put in there so that in the event of a situation arising where we needed to work times other than the straight, normal working day, we could under certain conditions obtain the men to do the work.

Q. You talked of the differentials that are added into a man's pay, is there time and a half included on the differential in fixing the so-called overtime rate in the contract? A. On general cargo, you mean?

Q. Yes. A. Yes.

Q. Time and a half on the differential? A. Time and a half on the differential?



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Q. Yes. A. No.

Q. There is not? A. There is not.

Q. You have indicated a distinction between work on passenger ships and cargo ships with respect to the work of the longshoremen. A. You mean with respect to the time, sailing time?

Q. Yes. A. Yes, there is.

Q. There is a distinction in your opinion? A. Yes.

Q. Generally all passenger ships also carry cargo? A. I would say with very few exceptions most of the ships could be classified as combination passenger and cargo ships.

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Q. Is there in cases of passenger ships greater pressure because of sailing time announced to passengers to terminate loading or unloading than there is with respect to straight cargo ships? A. Oh yes, to finish them at a definite time, oh yes.

Q. Is there then greater occasion or does it happen on more frequent occasions that there is night work on passenger ships in loading or unloading than there is on cargo ships? A. That is quite involved, depending upon the type of cargo and the number of days the ship is in port. We work to a definite date on a passenger ship where a cargo ship we can, if necessary, fall back six or eight hours.

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Q. You have said, however, that a variation of two or three or six or twelve hours under normal conditions on a cargo vessel was not important. A. It is important, but we try to—

Q. Suppose you tell us how it is important. A. We try to avoid it. If we set a date up and a time for a ship, regardless of what type of ship it is we like to complete the job and sail her at that time; but in the event of a cargo ship falling back for some reason or other two to four hours, it is not as serious as it would be for



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a passenger ship that is scheduled to sail at a definite time.

Q. To whom is it important whether the cargo ship sails on time or not? A. I think it is important to the steamship company to sail it.

Q. Why? A. They have certain cargo commitments—oh, various reasons why they want to sail her at a time.

The Court: Its business is to carry cargo?

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The Witness: It is in competition with other companies.

The Court: He is not carrying cargo while he is sitting waiting for a crew of longshoremen to come back to work.

Q. And that is what induces them to give night work to longshoremen to get the ship filled as soon as possible with its cargo and get it off? A. It is not quite as easy as that. It is not quite that way.

(Recess until 2:15 p. m.)

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#### AFTERNOON SESSION.

ANDREW D. WARWICK, resumed the stand.

Mr. Goldwater: In inquiring of this witness if he knew of the work weeks in a period prior to 1926, your Honor will recall that I asked if he knew if the work week was 40 hours in the period from 1918 to 1919. Mr. O'Grady, my associate, has re-examined the contract. Apparently there is a conflict and confusion between the first and second paragraphs. I think it may well be con-



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sidered that that work week was 44 hours. The other work weeks I referred to were in fact 48. The contract, if anyone looks at it, you will see is very confusing. It may well be considered as 40 or as 44. I would think that the better construction on a re-examination was 40 at that time, and not 44, as I indicated in my question.

Mr. Taylor: I was going to call your Honor's attention to that matter, because the contract reads, "The basic working day is eight hours and Saturday half-holidays."

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Mr. Goldwater: If you will look at the next paragraph, that is where the confusion arises, where the words "exclusive of Saturday" come in. You do not know how to treat the "exclusive of Saturdays", whether they are talking of forenoon Saturday or all day Saturday. However, we will agree that the better construction would be 44 hours and not 40.

I have no further questions at this time.

(Witness excused.)

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PHILIP L. B. IGLEHART, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination by Mr. Taylor:

Q. Where do you live, Mr. Iglehart? A. Westbury, Long Island.

Q. What is your business? A. Vice-president and a director of Huron Stevedoring Corporation, and also the same of the parent company, Grace Line, Inc.

Q. How long have you been connected either with Huron or Grace Line? A. I started with Grace Line in



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1931, and I think I became an officer of Huron in 1940 or 1941.

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Q. Tell us a little bit about your experience on ships, on piers and stevedoring operations, and so on, so that we will know a little bit more about your background?

A. I started working as a cadet on board ship in 1931, and went through the various departments of the steamship company, including accounting and claims, and about five years in traffic, somewhat interlacing with the operating end; and my first task with operations was in 1939 as superintendent of one of our piers; and then in 1941 I became vice-president of operations of Grace Line.

Q. What have you been doing during the war? A. I remained in that job until 1943, where I spent about half of my time with the War Shipping Administration here in New York; and then, when the present War Shipping Administrator, Captain Conway, was called to Washington in March, 1943, as deputy administrator, I went down as his assistant. I was there about two years.

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Q. Will you tell us a little bit about the Grace Line, the nature of its operations and about Huron, and so forth, so that we will get a picture of that. A. The Huron Stevedoring Corporation, for all intents and purposes it is the stevedoring company of, or does the stevedoring for the Grace Line only. That in explanation of the fact that we are not quite in the same category as what is known as a contract stevedore. We do not do stevedoring for any other steamship companies. At present the operation is at Piers 57 and 58 on the North River.

Q. Now about the Grace Line. A. Do I understand not during the war? Because the war period was something where we acted for the government as agents. We were not operating our own vessels, and the entire



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method of operating steamships was somewhat different than it is in normal times.

Q. I meant particularly in normal times. A. In normal times we operated a service from New York and other Atlantic ports to the west coast of South America, which was fundamentally a weekly service, with combination passenger and freight vessels. In addition to that, from 1937—prior to 1937—we operated the service with passenger vessels, the same freight and passenger vessels, between New York and California. Since 1937 we have operated with the same ships that were in the California run a weekly service in the Caribbean, primarily to Venezuela and Colombia. In addition to that we operate a freighter service from Gulf ports to the west coast of South America, and from Pacific and North Pacific ports to Central and South America.

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Q. In connection with this matter of longshoremen's work and stevedoring which we are concerned with here in this case, is there a difference in actual practice between passenger vessels and cargo vessels? A. Yes, there is a very considerable difference, and that, again should be broken down into categories of different types. For instance, the big Transatlantic carriers which are probably primarily passengers, carry a very small percentage of freight. The category of passenger vessel that we operate, the port time that is required, say in New York, is basically that time required to handle freight. We cannot turn the ships around just for passengers. They have to stay here a sufficient time to load and discharge cargo. There are really two more categories. The other, the third, is a straight cargo vessel, which does not have the requirements of a passenger liner, which is on a given schedule with very definite commitments. The delay of a cargo vessel is

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not half as important. The fourth category is the tramp, which I simply mention because there is a fairly big business in tramping.

Q. And you have boats, as you have told us, in those different categories, except perhaps the first one that you mentioned? A. The first and fourth we do not really.

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Q. Would you care to generalize a little bit more, Mr. Iglehart, as to the relationship between the type of vessel as to schedules and time of cargo loading and unloading, and so forth, and how it may work out in whether a vessel's operation involves more or less overtime while in the port of New York. A. In the case of a cargo vessel, in the first place the construction of the vessel is such that it is built for handling freight. The hatches for working cargo are large. Every provision is made to be able to handle cargo of any particular type as expeditiously as possible, whereas on a passenger vessel you have to give way somewhat to take care of passenger accommodations. You may have to, what is known as "trunking" the hatches, where you take the tweendecks of a ship and put passenger accommodations in them, permanently built in them, which means instead of being able to handle cargo at the decks you have to go through perhaps two decks into the lower hold to get at it. The difficulty of handling a passenger ship through side ports, or other instances I have given, makes them a more difficult freight operation. At the same time a passenger vessel generally, because of its speed and the type of cargo it carries, the fast boat or a boat on a definite itinerary, generally can secure a higher class of better-paying freight than an ordinary freighter, and it would require a good deal more time to handle, say, a like amount of tonnage on a passenger ship for those reasons than it would on a freighter.

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Q. Well it is your own experience that the different kinds of vessels which you operate show any usual or common difference between different kinds of vessels and the amount of overtime that you put in on them in the port of New York? A. Yes, we work a great deal more overtime on passenger vessels than we do on freight. Particularly on one of our routes we have a contract with the United States Government where we have to name specific vessels, their itinerary, their arrival and departure dates. In one case they covered 27 or 28 ports and arrived at a given date and departed at a given date. We have other dates for cargo that require arrival and departures—

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Q. The significance of that is that where you have a schedule to meet you may run into conditions of one sort or another which make the use of overtime longshore work necessary, that would not be true in the case of cargo vessels or the other types which have greater freedom of schedule? A. That is true.

Q. However that may be, have you any hesitation in saying that you never work any overtime if you can possibly avoid it? A. No, that is perfectly correct.

Q. Is there any doubt that this 50 per cent overriding that is provided for in this port is a real deterrent? A. It certainly is. In particular, I don't think its purpose—it is not the most important point, but certainly any line under the American flag with stiff competition in offshore routes has got to keep its costs down just as far as possible if they are going to be able to continue to operate against competition in foreign markets.

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Q. Is that one reason why you tried to increase your efficiency and work as much during the daytime hours as is possible? A. That is correct. For example, on the ships we operated before the war we used to be able to work as high as 11 and 12 gangs, whereas an ordinary



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*Philip L. B. Iglehart—For Defendants—Direct.*

freighter can work five or six, and we did work that in normal working hours. We worked the maximum gangs that we could work in normal daylight regular hours, and at night we put on what gangs were required to carry out our work.

The Court: You are aware of the fact that the present controversy relates to a period or was completely during the war?

Mr. Taylor: Is that a question to me, sir?

The Court: Yes.

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Mr. Taylor: To be sure, but, after all—

The Court: Are you going to get to the differences between this historical period and the period in issue.

Mr. Taylor: Of course, the historical period is the one in which Congress came forth with these words which your Honor is going to construe.

The Court: I am aware of that.

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Q. Won't you tell the Court, then, Mr. Iglehart, something about the differences, such as they were, between peace time and war time practices? A. Well, in our particular case we were one of the few lines that operated exclusively in the Western hemisphere, and we were classed as a commercial necessity. We had to continue, with whatever vessels were put at our disposal, to carry cargo in all of our routes.

The Court: You operated under an agency agreement with the Washington Administration?

The Witness: Yes, we did, general agency. The only exception to that was the period where the submarine menace made it necessary to transfer operations from here to the Gulf.

Q. I think the Court was particularly interested in any comparisons between peacetime and wartime, with respect



to the proportion of overtime and straight time that was put in on the vessels. A. Well, in war time in this port the fact that piers were at a premium and that ships were at a premium meant that we had to work whatever equipment we had to, fullest capacity. Therefore, to secure greatest efficiency we tried to keep those vessels which were going in a particular trade with any regularity at our own terminals, and to get them out on convoy dates as soon as it was humanly possible to do so.

By the Court:

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Q. That meant more overtime? A. Oh, absolutely it did.

Q. As a matter of fact, you operated overtime more extensively during the war? A. We certainly did.

By Mr. Taylor:

Q. That fact was a wartime abnormality? A. The regularity of it?

Q. Yes. A. Yes, I would say so.

The Court: You also suffered from a shortage of manpower? 297

The Witness: Yes, we could have used a lot more men if we could have found them.

Q. You are familiar, of course, with the Collective Bargaining Agreements here in court? A. Yes, sir, I am.

Q. And were you familiar at all with the negotiations of the various agreements as they were going on? A. Yes, I was.

Q. What can you tell us, Mr. Iglehart, about the reasons, if they exist, why shipowners did not want to work overtime? A. Well, from a shipowner's point of view it



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meant paying a premium over the ordinary rate of wage in the normal working day. In addition to that, I am certain in my mind that we don't get the same efficiency working at night that we do in the daytime.

Q. You heard what Colonel Warwick had to say about that, did you? A. Yes, I did.

Q. And is what he said in accordance with your own observation and experience? A. Very substantially, yes.

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Q. With respect to the attitude of the men, the long-shoremen and their union, as to whether or not they wanted to work nights, what can you tell us about that from your knowledge? A. Well, I think that our particular service is more an exception rather than the rule of the port, and I think that in view of the fact that we did work a good deal of overtime that we attracted men to stay with us, and it attracted men to work a certain amount—I think most of the men wanted to work a good deal of overtime.

The Court: The men did want to work overtime?

The Witness: Yes.

300

Q. That is, your company—they knew that for the reasons you told us, your passenger schedules and mail schedules, and so on to be met—that you did in fact work a considerable amount of overtime on the Grace Line boats, you think more than perhaps any other concern that you know of in the port, and that was known to the men? A. That is correct.

Q. And that was the place to which men who might want to work overtime when overtime was available naturally came? A. I am referring to the wartime years again.

The Court: Yes, as far as you found the men that you employed, they were eager to work nights?

The Witness: I wouldn't say eager. They were



*Philip L. B. Iglehart—For Defendants—Direct.*

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willing to work nights. I would say in peace time the majority of the men would not wish to work nights.

Q. How did they indicate that? Why do you say so?

A. Well—this is only hearsay.

Mr. Goldwater: Then I will object to it, of course, your Honor.

Q. You walked into that one with a lawyer in the courtroom. Tell us what you know about it yourself. A. From my own knowledge, then— 302

Q. I assume that you can include—

The Court: Let me decide whether what you will say is hearsay within the hearsay rule.

Q. Yes, you know what is going on in the port. Tell us what you know. A. There was a great deal of difficulty in the port as to overtime. Some men wanted to work exclusively overtime, because of the money involved. In our case we never had that particular—I don't recall any instances where we had any difficulty on that account. If we wanted to work certain gangs—a certain number of gangs—overtime, they were ordered to work overtime, or straight time. They worked in straight time. We had never had any particular difficulty with anybody demanding to work overtime, or demanding to work straight time during the war period. 303

Q. How about the attitude of the men? A. I would say the majority of the men, without any question, would prefer not to work at night.

Q. What was the attitude of the stevedoring companies with respect to whether they wanted to have the men work overtime or not? I mean now not your company,



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*Philip L. B. Iglehart—For Defendants—Cross.*

which is a subsidiary, but the general contracting stevedores who had their contracts on a cargo tonnage basis? A. Well, from my own experience, if you work men for long hours you will not get the same efficiency and the contracting stevedores would certainly be interested in working straight time only if their livelihood depends on it. I have not had experience as a contracting stevedore, so I can't talk as such.

305

Q. I see. Is it true throughout the port generally, as between contracting stevedores and steamship companies, that the contracts provide that the stevedore must get permission to work overtime? A. That is correct.

Q. And that was true during the war also? A. That is correct.

Mr. Taylor: Your witness, Mr. Goldwater.

Cross Examination by Mr. Goldwater:

Q. Mr. Iglehart, I would like to ask you first whether you participated in the negotiations for the Collective Agreement which became effective on October 1, 1943? A. Yes, I did.

Q. Were you one of the committee of the— A. Yes.

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Q. —of the Shipping Association here? A. Yes, that is right.

Q. Weren't you at that time engaged in the War Shipping Administration? A. No, not—you said the 1941 to 1943 contract?

Q. No, I am talking of the one that became effective October 1, 1943. A. I did not work full time for the War Shipping until the spring of 1944. I worked part time in the New York office of the War Shipping Administration.

Q. And you devoted the rest of your time to your private— A. That is correct.

Q. —connection with Huron and Grace. A. That is correct.



*Philip L. B. Iglehart—For Defendants—Cross.*

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Q. Then you did participate in that Collective Bargaining Agreement? A. I did.

Q. Did you participate in any previous collective agreements? A. My recollection is that I participated in one previous.

Q. Would that be the one that was effective on October 1, 1941, that is, two years previously? A. That is correct.

Q. And were you familiar, without having participated in that, with any contracts with the Longshoremen's Union in this port previous to that time? A. In a general sense.

Q. Well, were you familiar with the rates of pay that were paid for the so-called straight time, that is during the hours of 8 a.m. and 5 p.m., and the rates of pay which were paid for all other hours of the day, or night work? A. Not without reference to the contracts.

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Q. Do you mean without reference to it you can't tell me what the rates were in each of the contracts? A. I could not.

Q. And you cannot now recall whether the rates changed from one contract to another? A. I know they did change, but I couldn't give you the amount or the exact date when they did.

Mr. Taylor: When you say "contracts", you mean the Collective Bargaining Agreements? 309

Mr. Goldwater: Well. I am talking about them.

Q. You understood those are the contracts I am referring to, Mr. Witness? A. Right.

Q. Now, do you know whether there was any change in the relationship of pay between day and night work, or day work and so-called overtime work from year to year as these contracts were rewritten? A. I wouldn't want to say for sure, but my recollection was that there was the same relationship in those two or three periods.



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Q. And what is your recollection as to that relationship?

A. It was time and a half—50 per cent above the normal rate of pay.

Q. That is the time over what was called straight time—

A. That is correct.

Q. —which applied to all hours beyond 5 in the evening was 50 per cent more than the pay for straight time hours? A. That is my recollection.

Q. Now, your company had a number of men or gangs which worked nights only, did they not? A. That is correct.

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Q. Had you anything to do with the employment of gangs at any time? A. Myself?

Q. Yes, yourself. A. No.

Q. Did you have, in your experience in the shipping industry—I notice that you have testified that you had worked through various phases of the business. A. I never had that particular experience.

Q. That particular experience you have never had? A. No.

312

Q. Do you know of your own knowledge whether men who worked for consecutive weeks, two, three, four or five, during the daytime, were ordered to work a week of night work every so often? A. You are speaking of the period of the war?

Q. Yes, during the period of the war. A. I think it is quite probable.

Q. Have you any knowledge of the regularity with which that occurred? A. I don't think there was any regularity during the war period, no.

Q. But every so often a day gang would be told they were required to work night time? A. That is correct.

Q. That was not an exceptional thing, though, was it? A. No, I wouldn't say so.

Q. What is your knowledge with respect to regularity with which men worked Sundays during the war period? I



*Philip L. B. Iglehart—For Defendants—Cross.*

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am talking now of 1943, 1944 and 1945. A. Well, as I said before—

Mr. Taylor: Is this question directed to his own company or generally, Mr. Goldwater?

Mr. Goldwater: Well, I would like to know as to both. I am glad that you called that distinction to my attention.

Mr. Taylor: Suppose you break it up into two parts.

Mr. Goldwater: That is right.

314

Q. Suppose you tell us first what the condition was with respect to your own company. A. There was a considerable amount of Sunday work—there is no question about it—on our own terminals. As to the rest of the port, I would not like to speak—

Q. Did any of your experience with the War Shipping Board in the course of your duties there supply information as to the practice in other companies? A. Well, for a period during 1944 on it did. In that period there was a good deal of Sunday work.

Q. With other companies as well as your company? A. That is correct.

Q. Before I leave that subject, may I ask you whether you would give the same answers with respect to holidays, both as to your company and other companies? A. Yes, I would say so.

315

Q. There was a considerable amount, in other words, both with your own company and other companies, of holiday work? A. Well, we certainly would not wish to work Sundays or holidays unless it was absolutely necessary.

Q. That is not the question. The question is, as a fact there was a considerable amount of work in your own company on holidays and Saturdays?

Mr. Taylor: Which is it?



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*Philip L. B. Iglehart—For Defendants—Cross.*

By the Court:

Q. Just in your own company you said the answer is yes?

A. Yes.

Q. And in the port generally? A. The period that I know of there was considerable.

Q. You know about the period in 1944? A. Part of it, yes.

By Mr. Goldwater:

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Q. Do you know about the period of 1943? A. No, I don't.

Q. Do you know about the period of 1945? A. No, I do not.

Q. Only in 1944, and what months in 1944 are you alluding to? A. May through, say, August.

Q. From May through August? A. Yes.

Q. Now you referred to the overtime subject generally in your comparison between work before the war and during the war period, and said that there was abnormality in the wartime period? A. That is correct.

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Q. With respect to so-called overtime? A. That is correct.

Q. In answering questions on overtime in response to Mr. Taylor, did you have in mind any distinction between overtime in the sense of an hour or two or three or (four, or more, worked by a man after the completion of his day-time stint and time worked beginning at a night hour? A. No, I did not make any difference.

Q. You made no distinction? A. I am not entirely clear as to the question.

Q. Well, in answer to Mr. Taylor's question you answered him with respect to overtime generally, and he referred just to overtime. He made no distinction in his questions, or indicated none, between work by men who had worked a full day and then continued an hour, two, three,



*Philip L. B. Iglehart—For Defendants—Cross.*

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four, five or more, and men who began after 7 in the evening. A. My answer was based on the number of hours worked in excess of the normal day.

Q. You mean that you had no reference to hours as overtime worked by men who began after 7 in the evening? You were not thinking of them at all in answer to any of his questions? A. That was working overtime; that was included in my answer.

Q. You would call that work overtime, even though it only began at 7 at night or 8 at night? A. Yes; it is beyond the normal working hours.

Q. Beyond what normal hours did a man work who started at 6.55, at the 6.55 shape-up? Beyond what hours did he work? A. He worked entirely in overtime hours.

320

Q. It was not beyond any hours, was it? He began at the 6.55 shape? A. In a sense, yes.

Q. They were not hours worked beyond anything then, were they? They were beginning hours; isn't that true?

A. They are worked in overtime hours, as far as our working agreement is concerned.

Q. That is the point. Then you call them overtime hours because the contract calls them overtime hours? A. No, I don't.

Q. Why do you call them overtime hours? A. Because the normal working day is 8 to 5, and they were working hours other than those.

321

Q. Is the supposititious case which I put to you, a case in which a man worked during the daytime—did you understand it to be that case? A. No, I did not.

Q. Then I ask you again what hours did he work beyond the normal hours of the day for him?

Mr. Taylor: I think you have got to define the word "beyond" as you are using it in your question.

Q. You understand the question, Mr. Witness? A. As far as I know I answered it to the best of my ability.



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*Philip L. B. Iglehart—For Defendants—Cross.*

The Court: I think even I understand it by this time. It is very clear that the term "overtime" in this contract—

Mr. Goldwater: I want to know whether the witness, when he uses the word "overtime" is using the term because it appears in the contract designated that way.

The Court: In other words, a man who worked only nightly five days a week 40 hours time would get paid 60 hours?

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The Witness: That is correct.

The Court: Despite the fact that he only worked 40 hours, and in one sense he did not do any overtime work but in another sense did all overtime.

The Witness: That is correct.

The Court: That is the sense in which you use it?

The Witness: That is correct.

Q. Is the sense in which you say he did overtime work the sense which has reference to the rate of pay that he got?

Mr. Taylor: I object.

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The Court: Objection sustained, only because it is repetitive. I think it is perfectly clear, and I do not think there is any controversy between you two gentlemen on the subject.

Mr. Taylor: Not the slightest. He asked the question for the sake of emphasis, but I am sure your Honor got it a long time ago.

Mr. Goldwater: I do not want the testimony, on a record which will probably be appealed, to be the slightest bit confusing.

The Court: I do not think there can be any remote doubt that the term "overtime" in this controversy does not mean hours in excess of 40. It may mean that, but it may also mean, and generally means, hours outside of the scheduled hours of 8 to 5.



*Philip L. B. Iglehart—For Defendants—Re-direct.*

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Mr. Goldwater: But something more; it does not mean hours worked by an individual on any day in excess of eight hours, either.

The Court: That is right.

Mr. Goldwater: I would like to know whether the witness agrees to it.

Mr. Taylor: Oh, we all know that. Can't we get along with the case?

Mr. Goldwater: We can when the witness answers the question.

Mr. Taylor: He has answered it a half a dozen times.

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The Witness: That is correct.

Mr. Goldwater: The witness says that is correct.

Q. In answer to one question, if I heard you correctly, you said that you had no trouble with men working nights?

A. No, not particularly.

Q. And you said some men wanted to work nights? A. I think that is correct.

Q. And you said that they wanted to work nights because of the premium pay; do you recall using those words? A. I do, but I think it may have been an assumption on my part.

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The Court: And some men want to keep out in the sun. That is possible.

Mr. Taylor: I have no doubt that is what directs a good many of them when there is work to be done.

Mr. Goldwater: That is all.

Re-direct Examination by Mr. Taylor:

Q. About the matter of straight time pay, overtime pay, and whether overtime pay is always time and a half straight time pay, while you did not go into figures, I



328 *Philip L. B. Iglehart—For Defendants—Re-cross.*

think you answered Mr. Goldwater to the effect that as you recall the contracts the overtime rates are always time and a half the straight time rates? A. I think he asked me about specific agreements, and my recollection on those was it was time and a half.

Q. But you are familiar, are you not, with the fact that there is a group of four kinds of so-called penalty cargo, with respect to which it is the custom here, and is also provided in the agreement, that a differential of 5 cents or 10 cents or 15 cents is added above to the straight time rate of pay, and the overtime rate of pay? 329 A. Yes.

Q. And you knew that? A. Yes, I do.

Q. But the reason you answered the question as you did was because you and the other folks, so far as you know, regard that as essentially part of general cargo carrying the straight time rate of \$1.25 and the overtime rate of \$1.875, with the added differential in either event?

A. I assumed in answering the question we were talking about the basic longshore rate.

330 The Court: Where a man did a normal day's work, 8 to 5, but in the aggregate it added up to more than 40 hours, would you then give him time and a half?

The Witness: We certainly did.

The Court: Although that is not covered by the I. L. A. agreement?

The Witness: No.

Re-cross Examination by Mr. Goldwater:

Q. What did you mean when you said in answer to his Honor's question that when a man worked over 40 hours you then paid him overtime? Will you illustrate for me?

A. I assumed that you were referring, your Honor, to the compliance with the Fair Labor Standards Act.



*Philip L. B. Iglehart—For Defendants—Re-cross.*

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The Court: That is right.

The Witness: We do comply with the Fair Labor Standard Act.

The Court: He wants an illustration of where you do that, a suppositious case.

Q. I want what you did factually. A. As an example, the bargaining agreement with the I. L. A. provided for 40 hours a week. If a man worked 40 hours between Monday 8 a. m. and 5 o'clock on Friday, we would pay him time and a half for the period 8 a. m. to noon on Saturday.

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The Court: Although that was not so stated in the contract?

Q. Will you tell me, at time and a half, what would you pay him? A. The rate of pay for the normal working day.

The Court: In other words, you paid him \$1.875 for those four hours, instead of \$1.25?

Mr. Taylor: If he was working on general cargo.

The Witness: Yes.

333

Q. That is what we are both talking about. What would you pay him if he worked as a header, do you know? A. I am not dead certain of this, because I have not actually seen our recent records, but my recollection is that we paid the same premium in straight time—in overtime as we did in straight time.

Q. You mean you added the premium to what you call overtime?

The Court: Not time and a half on the premium.



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*Philip L. B. Iglehart—For Defendants—Re-direct.*

The Witness: I am not too certain, but my recollection is we did.

Re-direct Examination by Mr. Taylor:

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Q. I want to follow that up a little bit more. If it so happened that he was working in those Saturday morning hours, having first worked 40 straight time hours during the week, and he was working Saturday morning on explosives, we will say, which carry a \$3.75 overtime rate, you would pay him \$3.75, wouldn't you? A. That is right.

Q. And if he was working under such conditions on a Saturday morning handling kerosene, which carries in this book here \$1.45 straight time and \$2.175 overtime, you would pay him at the \$2.175 rate? A. On what commodity?

Q. Kerosene. A. Yes.

Q. So can we boil it all down and settle it once and for all that if you had to pay him or did pay him overtime hours on Saturday morning because he had worked 40 straight time hours Monday to Friday inclusive, you paid him at the overtime rate stated in the Collective Bargaining Agreement? A. That is correct.

836

The Court: Supposing he did 40 hours of night work and then he did four more hours on Saturday morning, did you pay him time and a half or did you pay him \$1.87, or did you pay him two—

The Witness: \$1.875.

The Court: That is what you paid him?

The Witness: Yes, sir.

Re-cross Examination by Mr. Goldwater:

Q. That is an important question, and I hope you will understand the spirit in which I ask you to consider it



*Philip L. B. Iglehart—For Defendants—Re-cross.*

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again. I am quite sure you understood his Honor's question, and I say this advisedly, because from the records we have seen we think the fact is different. I am calling it to your attention only for that reason. A. I have not examined the records.

Q. I would like to have you put a positive answer on the record. A. The actual time sheets I have not seen.

Q. You understood the question? A. I understood the question to be that within one working week a man worked 40 hours.

The Court: 40 hours of night work, and then on Saturday morning in addition; what did you pay him for the 40 hours and Saturday morning?

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The Witness: I said \$1.875.

Q. You have not looked at the records recently? A. I have not, no.

Q. Would you be kind enough to examine the records? A. I will.

Q. And will you let Mr. Taylor know if you would like to change that answer? A. I will.

Q. As I would like the record to be accurate with respect to that. A. Yes.

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Q. Did your company handle any explosives? A. Not as stevedores, no. We may have handled isolated lots, but we do not as a usual matter handle explosives.

(Witness excused.)



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*Laurence C. Howard—For Defendants—Direct.*

LAWRENCE C. HOWARD, called as a witness on behalf of the Defendants, being duly sworn, testified as follows:

Direct Examination by Mr. Taylor:

Q. Where do you live, Mr. Howard? A. Niantic, Connecticut.

Q. And your business is what? A. Steamship stevedoring.

341 Q. Here in New York? A. Our home office is here in New York, although we function at various ports on the Atlantic Coast.

Q. What is the name of your company? A. The stevedoring company is Nacirema Stevedoring Company.

Q. Will you please tell us about your experience with ships and stevedoring and so forth? A. I have been in the stevedoring and steamship business for about 37 years, part of the time as master of a ship, running a stevedoring company and superintendent of a dock; and during the war years I acted as consultant to the Army and also to the Navy on stevedoring matters.

342 Q. What does that mean? A. Acting in an advisory capacity in the preparation of stevedore contracts, and the general administration; also checking on the operations.

Q. In what part of the country? A. The Atlantic Coast, Gulf and Pacific, and this year I also made a survey of the labor and stevedoring conditions of the port of Honolulu.

Q. I want to ask you some questions about straight time and overtime business. I am going to make it very general and allow you to tell it in your own way, if there is no objection, so I will ask you to tell us, if you will, Mr. Howard, speaking now with respect to the conditions prevailing in the port of New York prior to the war



*Lawrence C. Howard—For Defendants—Direct.*

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years, what the practices were with respect to working overtime along this waterfront here, the attitude of the stevedores and the men; the extent that there was overtime, and so forth; just tell us about it in your own way. A. As far as the steamship companies were concerned, they were opposed to it on account of the extra cost. The contractor would be opposed to it on the ground that he could not get the production from his men. As a matter of fact, in our own experience we estimate that we should have at least 20 per cent over and above the straight time; that is the commodity rate based on straight time, when we work overtime hours. As far as the men are concerned, I think that without question there are a few that would want to work for the dollar, but I would say that by far the majority would prefer not to work nights, and the way it worked out in actual practice was, I believe, that most steamship companies in preparing a voyage schedule worked it out on the basis of 24 hour steaming days at sea and eight-hour days in port. They would have to do that. If they did not they would not have anything to fall back on in the case of emergencies and delays of the ship from various causes, so that the only overtime was that which was absolutely necessary in order to keep the ship on schedule.

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Q. Are you in position to tell us about what I will call the official union attitude on the matter of overtime as distinguished from the personal inclination of some ambitious men who would like to get as many dollars a week as they could? A. You mean the official position of the union?

Q. With respect to overtime, and whether the men should or should not work outside of the so-called normal day? A. It is obvious, it is in the agreement, that the men shall work nights when required, and I think their attitude would be the same as that of the steamship com-



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*Lawrence C. Howard—For Defendants—Direct.*

pany and the contractor, that they would sooner not see the work done unless there was an actual emergency.

Q. That is, the provision in there which says men shall work at nights, Sundays and holidays when required, was something which the employer put in in order to overcome the inclination of the men not to work at night? A. That is right; I think it was put in there in the event it was absolutely necessary to do this work.

347

Q. How about the provision in there that says if you order men, or try to put them to work at 7 o'clock that night when they have not been working before that day, the provision that if you do that you have got to pay them four hours of work. What was that put in there for? A. That was to make as sure as you could the men would show up, but I have seen plenty of shapes at 7 p. m., where men had promised to come back where they just did not come.

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Q. How about war time compared with peace time; what is the difference, and why? A. As Mr. Iglehart pointed out, there was an extreme shortage of berths and port docks. There was a shortage of ships, and everything went into the pot as far as money was concerned in getting the ships turned out and the decks cleared. That is, there was no regard paid to the economy of operation as far as time and material were concerned.

Q. But it is still true, as some of the other witnesses here have said, that you had to consult the War Shipping Administration and the Army and Navy? A. Always, but that was their invariable order, to turn the ship around and get her out and work the overtime, but we had to have the approval to be sure of collecting our money.

Q. Has your company followed the practice of paying the men according to the Collective Bargaining Agreement, with the modification that where they have worked 40 straight time hours, Monday to Friday inclusive, you



*Lawrence C. Howard—For Defendants—Cross.*

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then pay them an additional amount for such time as they work on Saturday morning at the contract overtime rates? A. That is right.

Q. As far as you know that practice has prevailed throughout the port? A. That is right.

Q. Did you ever have any complaints, or hear of any complaints, until these suits were brought, on the part of either the union or employees, from the following of that practice?

Mr. Goldwater: Objected to as immaterial.

The Court: It is immaterial. However, you 350  
may answer it.

A. Never.

Cross Examination by Mr. Goldwater:

Q. You have said, Mr. Howard, that, as I understand it, the chief difference between the conditions before war time and after war time with respect to this pay, overtime, was that there was no regard paid to economy of operation after the war. A. I beg your pardon, I said during the war.

Q. I mean during the war. I mean after the war began. We are talking of the same thing. A. Yes. 351

Q. And that your orders then were to turn the ship around and get it out? A. That is right, in the majority of cases. Of course there would not have been any sense to do a thing of that kind where you had two weeks of repairs.

Q. We are talking about the normal case. A. We were trying to make the convoy dates.

Q. Did not the economy of operation prior to the war dictate to the companies that the best thing for them to do was to get their cargo off and get their new cargo on and turn the ship around and get it out as quickly as



possible? A. That kind of turn-around in normal times is always desirable, but that does not necessarily mean you load that ship down with day and night gangs and work it 24 hours a day.

Q. I asked you whether or not economy of operation did not dictate to the companies getting the cargo off and on as quickly as possible and getting the ship out? A. With other factors taken into consideration.

Q. What other factors? A. For example, a ship coming in from a long voyage might take ten days to two weeks for voyage repairs. There would be no object in loading that ship while she was still under repair.

Q. Of course not. That is not the normal case. You said a moment ago that that did not apply to ship repair cases. A. Oh, I beg your pardon, I did not mean to say that.

Q. Then go on. A. There will be other conditions—availability of cargo and the limited capacity of the dock facility where you are unloading, that you can only unload at a certain state. Ordinarily you would not work more than 10 to 20 per cent of the vessel's capacity outside of the normal working day of eight hours, because your schedule is predicated where you make it up weeks and months in advance, on an eight-hour work day as far as working cargo is concerned, with the idea of only going into overtime in case of unforeseen conditions of emergency.

Q. What happens when you make up your schedule weeks and months in advance and the ship does not get in on time? A. That is a question to decide then, as to whether you change your schedule, or whether it is better to work more overtime and get her to sea. And there also, again, your voyage repairs come into the picture.

Q. Let us leave repairs out? A. They are something that is with us all the time.



Q. Do you know of cases where your cargo arrangements are under contract to get your delivery at a certain time at a certain port? A. There are such cases, but that is mostly in connection with chartered vessels, where they have what they call dispatch and lay days, but on a regular berth service it is a question of supply and demand. You might get a promise that you would get it, and it might not come through sometimes for hours or days afterwards.

Q. Do you lose out with your contracts and your connections when you do not keep your promises for a long time? A. Regularity of service is always an asset in the securing of cargo.

Q. Then in order to meet schedules it would be in the interests of the company to work nights if your ship came in late? A. We do that, within reason.

Q. Is it an unusual thing, even in peace time? A. It is unusual to work an abnormal amount of overtime. I would say anything over 25 per cent of the vessel's working capacity would be getting to the point of where it would probably be better to change your schedule and save the money.

Q. But you would not call working overtime up to 25 per cent abnormal, then? A. No, I would not. I am not thinking of the fast passenger liners, but about the medium ones, combination passenger and freight, somewhere in the middle between the tramp and the liner.

Q. How far back are you familiar with these rates of pay for so-called straight time and overtime? A. I have been on the New York waterfront since 1923, and any time I want to know anything about rates I take a little book out and look it up. I do not try to memorize it.

Q. Let us see if your recollection would agree with what I say to you. If it does not you will say so, of course. What is the relationship between the overtime and the straight time pay? A. You mean presently?



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*Lawrence C. Howard—For Defendants—Cross.*

Q. Yes. A. Time and a half.

Q. What was it in 1943? A. I do not recall specifically. I think we have been on time and a half for a few years, but I remember very well that it was something less than time and a half.

Q. How much less was it? A. I do not know. I am not even sure it was less.

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Q. Have you any recollection when there was a time when it was more than time and a half? A. It is possible, but I do not recall. I might say that I have never sat in on the committees on the actual negotiations of these wage rates. I am familiar with them from the operating point of view, but not from the negotiations point. If I had been on the committees I would have had a better memory as to just what these things were.

Q. Assume that at one time the night rate was double the day rate. A. I think that might be possible. I know in 1881 they did not have any overtime at all.

The Court: Do you know that from hearsay?

The Witness: No sir; I have a record in my office.

The Court: You did not personally participate?

360

The Witness: No, sir, I did not personally participate in that.

Q. You say you know what it was in 1881. A. I say I know there was none in 1881.

Q. Do you know what it was in 1874? A. No, I have got the book for 1881.

Q. Weren't you interested in knowing beyond that? A. I am always interested in reading anything I can get on the subject.

Q. Where did you get the book that shows you there was no overtime in 1881? A. My partner has it in the office. He has a lot of old stevedoring records.



*Lawrence C. Howard—For Defendants—Cross.*

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Q. But his library does not go back to 1874? A. I think it does. I think the company I am speaking of was founded in 1875, and I think they have some of the old records down there.

Q. You may be interested in what it was in 1874. A. I would like to know.

Q. Do you know the relationship prior to the war was approximately one and a half times? A. I don't know.

Q. You don't know that? A. No.

Mr. Goldwater: That is all.

Mr. Taylor: That is all.

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Before I call another witness, I would like to get the record straight on the matter of what the rates of straight time pay and overtime pay have been in this port, as shown by the exhibits which are already in evidence.

The Court: Is there any dispute about it? The questions were purely to test credibility and memory of experts.

Mr. Taylor: You do not know whether it tests the recollection or not until you know the fact, so I will now state, subject to contradiction by Mr. Goldwater,

The Court: Are they covered by stipulation?

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Mr. Taylor: They are in the evidence by stipulation, and they show that at no time since May 3, 1916, have the overtime rates been less than time and a half the straight time rate.

Mr. Goldwater: I am glad you supplied for me what the witness could not, because it is obvious now that there was no difference, which is the point I tried to make—no difference between the relationship prior to the war and after the war, or prior to the Act and after the Act.

The Court: I understand.

(Short recess.)



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*Frank W. Nolan—For Defendants—Direct.*

FRANK W. NOLAN, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination by Mr. Taylor:

Q. Now, Mr. Nolan, I guess we are back where we were a few moments ago. What is your name, sir? A. Frank W. Nolan.

Q. And where do you live? A. I live in South Orange, New Jersey.

365 Q. What is your business? A. Stevedoring. President of a stevedoring company.

Q. What is the name of your company? A. Jarka Corporation.

Q. How long have you been connected with that corporation? A. A few months short of 25 years.

Q. Does that 25 years include all of your period of activity on the waterfront here in the stevedoring industry? Have you always worked with them? A. In stevedoring, always for the one corporation. I was in the steamship line business for the preceding two or three years. Prior to that time I was in the Navy during the last war.

Q. What is your position at Jarka? A. President.

366 Q. What sort of a company is Jarka? How big, what sort of operations and so on? A. Well, it handles a considerable volume of business, I wouldn't care to say how much.

Q. It is one of the big ones here in the port, is it not? A. I think perhaps it is.

The Court: I will take judicial notice of it.

Q. Have you any special position on behalf of the contracting stevedores in the Port of New York with respect to the matter of union contracts, that is, negotiations and agreements from year to year? A. Well, I am a member of the Conference Committee of the New York Shipping



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Association, as a parallel to my position as Chairman of the Stevedoring Committee of the Maritime Association, and there are three members of the Maritime Association, Stevedoring Committee who join with the New York Shipping Association Conference Committee in the preparation of the wage agreement.

Q. How long have you fulfilled that function? A. Eight years.

Q. You consider yourself informed as to the union purposes, at least, as they have declared them in the course of these many negotiations, do you not? A. I think so.

Q. Well, then can you tell us in your own way what the attitude of the union is with respect to overtime and the way in which the contract provisions with respect to overtime are set up? What are they trying to get at? A. The reaction of the union representatives can be summed up in a few words: We either have regular time during the period under discussion, as I assume, forty-four hours, 8 to 12, and 1 to 5, on weekdays, Monday to Friday inclusive; 8 a. m. to 12 noon on Saturday, and all other time is overtime.

Q. Why did they want it classified in that way? What is the purpose of overtime in the industry? A. The purpose of overtime—

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Mr. Goldwater: Whose purpose?

Mr. Taylor: The union's purpose.

A. —well, I would say basically to get the benefit to its membership of increased income when and if they are called upon to work outside of the regular or straight time hours prescribed in the agreement.

Q. What if any purpose has it with respect to confining the work to a normal working day? A. Well, the union has maintained quite frequently that they only want to work straight time. Of course, they want to restrict the amount of straight time, which, of course, likewise makes more overtime.



*Frank W. Nolan—For Defendants—Direct.*

370 Q. If the overtime is only 5 cents an hour would you work more overtime than you do now? A. I would say quite assuredly so.

Q. Does the fact that you have to pay these high rates dissuade you from working overtime? A. I would say so.

371 Q. To what extent? Can you generalize as to the attitude of the steamship companies and stevedores with respect to working or not working overtime hours? A. Well, the steamship lines insist that we as stevedoring contractors utilize every available straight time hour for work on the ship consistent with weather conditions, exposure of cargo and the availability of cargo. They insist, if the facilities are available, that we employ maximum gangs on the ship during straight time. I think that answers it, so far as I know.

Q. All right. It does certainly answer it from the point of view of the steamship company. Now, what if any difference does it make to the stevedoring company whether they work overtime or not? A. Well, we basically want to work the maximum amount of straight time anyway.

372 Q. Why? A. Well, if we are working men for eight hours and we have to lap over into overtime, we get less work performed. There is a fatigue proposition which you cannot escape. The productivity after a certain number of hours is on the downhill.

The Court: How about a new gang coming on at 5 o'clock or 7 o'clock, would they suffer from the same fatigue factor?

The Witness: Not so, your Honor, unless perhaps those men have worked during the day as well. We have no way of knowing that.

The Court: For another stevedore?

The Witness: Yes, your Honor.

Q. Aren't there a few other reasons, such as difficulties in locating gear and the difference in—



*Frank W. Nolan—For Defendants—Direct.*

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Mr. Goldwater: You mean the few other reasons that you are suggesting?

Mr. Taylor: Yes, surely.

The Court: At this stage of the proceedings I think we can dispense with leading.

Go ahead and answer the question, please.

A. We know that we have to utilize every regular time hour in the day. That is a fundamental requirement.

The Court: Do you make more working overtime or do you make more money working straight time? 374

The Witness: We make money, if any, your Honor, working in straight time. We get the best production during daylight hours.

Q. Your company works on a commodity tonnage basis? A. That is correct, with the exception of the war period when some were not.

Q. And the overriding which you get when you work per minute overtime does not take care of anything other than your actual disbursements for overtime? A. That's right. 375

Q. Plus your insurance premiums? A. That's right.

The Court: Before the war, Mr. Nolan, what percentage of the work of the Jarka Company was put out at overtime or at overtime rates?

The Witness: I would say, your Honor, about 25 per cent.

The Court: About 25 per cent?

The Witness: Yes, 75 per cent in straight time, as I remember.

Mr. Taylor: We will be able to give you those figures precisely.



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*Frank W. Nolan—For Defendants—Direct.*

The Court: That is, 25 per cent of the hours?

The Witness: 25 per cent of the hours, yes.

The Court: You do not mean 25 per cent of the pay?

The Witness: No, sir, 25 per cent of the hours.

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Q. The contract, as you know, that is, the one for the years 1943 to 1945, sets up a 44-hour week. The question is, why was no change made in the contracts in view of the fact that the Fair Labor Standards Act sets up a maximum work week of 40 hours as the regular rate of pay? Why did you retain Saturday morning as the straight time period under the contract? A. Well, there is a different view, may I stress here, between the Wage and Hour 40-hour limitation and a potential 40 hours within any 44. When I specify the working hours from 8 to 12 and 1 to 5 on weekdays, Monday to Friday inclusive, and 8 to 12 on Saturday there may have been cases where the men did not work at all on Monday.

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The Court: In which case they would only get straight time for Saturday morning?

The Witness: That's right.

The Court: Does the contract say 44 hours or does it just designate the day?

Mr. Taylor: It says 44 hours on page 2, I think.

The Witness: We may have had men, your Honor, who started to work straight time on Wednesday morning.

The Court: Yes, of course I understand that.

The Witness: Some, as a matter of fact, only start to work on Friday morning straight time, and the inference was to allow that 4 hours on



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Saturday morning as a straight time working period, and I may go one step further: to permit the men to get that employment on Saturday morning which otherwise they may not have.

Q. You mean that if you had set it up on a 40-hour contractual normal week, 8 hours, Monday to Friday inclusive, which would thereupon put Saturday morning into overtime, you would avoid working them on Saturday morning? A. It may have dissuaded an owner from working them Saturday morning.

The Court: How did you pay them? Did you pay them time and a half for those four hours if in fact they had already worked 40 hours?

The Witness: If they had worked 40 hours straight time I paid them overtime Saturday morning.

The Court: Supposing they had worked 40 hours night work and then worked 4 hours Saturday morning?

The Witness: We paid them straight time.

Mr. Taylor: I was going to ask that.

The Court: In that respect you differ from the last witness.

The Witness: I was not here when he testified.

Q. The question that was asked, I might say, of Mr. Iglehart, and he was not sure about it, was with respect to the pay on Saturday morning if they had worked 40 overtime hours in the week and he said it would be \$1.87½. You say that is not true but that it would be \$1.25? A. The regular base rate of pay was \$1.25 for Saturday morning.

Q. In other words, the only time in this port under the 1943-45 agreement where a man would get \$1.87½

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*Frank W. Nolan—For Defendants—Direct.*

for handling general cargo as a longshoreman on a Saturday morning would be when he had worked 40 straight time hours earlier in the week? A. That is correct, sir.

Q. Mr. Nolan, I am calling to your attention a statistical chart which has been admitted in evidence here—

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Mr. Taylor: The document in front of the witness, your Honor, is a copy of Defendants' Exhibit D, and I also would like your Honor to have before you the original of Defendants' Exhibit E.

Q. Directing your attention first of all to the exhibit which is marked Defendants' Exhibit E and which is entitled "Statistical Analysis of Work Hours of Longshoremen in the Port of New York from the payroll period nearest November 1, 1938 to the payroll period nearest August 31, 1939," I call your attention to the fact that in the lefthand column there are 17 code references under the caption "Company."

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Now, will you tell us how those 17 companies were selected, as far as you know, for the purposes of this statistical study? A. Well, as I recall these details and study they were gathered from a group of companies that constituted, as I remember, 70 per cent of the volume of activities in the port during that period.

The Court: You told me, I think, which were the two defendants in this case, but I no longer remember.

Mr. Taylor: The Huron is K.

The Court: There is no K.

Mr. Taylor: It is K—A.

The Court: That is Huron?



*Frank W. Nolan—For Defendants—Direct.*

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Mr. Taylor: Yes, that is Huron. And the Bay Bidge Operating Company is O-A. With respect to that, I call your attention to the footnote which shows that some of them were limited in period, the reason being, as evidence will later show, because of lack of records for the period covered in the study.

Q. Those companies were selected, as I understand it, in conference between yourself and Mrs. Schleifer of the War Shipping, and Commander Evans and Mr. Lyon. You all got together on it in order to get a group of companies which in your opinion were a representative sample of the port? A. That is correct.

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Q. From your knowledge of those companies and their operations, would you say that the information contained on that chart and the average figures which are at the bottom of the column are typical and representative of conditions in the port of Greater New York? A. At that time?

Q. Yes, for the period covered. A. Yes, sir.

Mr. Taylor: In order to make sure that your Honor has seen how this thing works—

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The Court: I see it. I can follow you.

Mr. Taylor: And for the purposes of the record, I would like to get in some of the relationships and figures which are shown by this chart.

The Court: You can do it in your brief. You do not have to do it on the record. You may do whichever you wish.

Mr. Taylor: I would like to emphasize, for instance, the fact that according to this study the percentage of straight time man-hours to total man-hours—that is column 3—is 75.03 per cent.



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The percentage of overtime man-hours to total man-hours—that is column 5—was 24.97 per cent in this period.

The Court: That would indicate that Huron was atypical in this respect.

Mr. Taylor: Yes, they were.

The Court: 47.63 per cent?

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Mr. Taylor: That is right, and that coincides, I should say, with what Mr. Iglehart pointed out this morning: that his company was perhaps the one that worked more overtime than any other company in the port.

The Court: The Bay Ridge is also atypical as being at the bottom of the scale or near the bottom of the scale.

Mr. Taylor: Yes, subject, however, to the qualification which I called to your Honor's attention, covering only a portion of the period.

The Court: Yes.

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Mr. Taylor: In column 7 you get the percentage of total overtime which was worked on Saturday afternoons, Sundays and holidays, and you see that it is 7.8 per cent of the total man-hours, and it is 28.35 per cent of the total overtime hours.

Then you come to a very interesting series of columns in which the overtime work after 5 o'clock in the afternoon and before 8 o'clock in the morning is broken down according to the number of straight time hours which a man had worked before working overtime; that is, for working nighttime overtime.

In column 12, for example, you have the number of instances and the number of man-hours worked between 5 p. m. and 8 p. m. by men who had al-



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ready worked from 6 to 8 hours straight time in the same day. You see that that makes up 57.81 per cent of the total of overtime worked at night. And carrying it on further, to the right of the chart, you find in column 24 a statement of the number of instances and the total number of man-hours worked by men between 5 p. m. and 8 a. m. in the morning who had not worked any straight time during the day, and you find that they as a group accounted for only 4.17 per cent of the total manhours worked in the period and only 16.69 per cent of the overtime worked during the nighttime hours.

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Mr. Goldwater: No, that is not correct.

The Court: He was reading from 27.

Mr. Taylor: That is right. I beg your pardon, I did misread it. Well, the references are clear. I am just calling your Honor's attention to it.

The Court: There is one column that you do not have, and that is, what percentage of the total time man-hours worked constitutes more than 40 hours a week?

Mr. Taylor: I have that in one of the other studies. 393

The Court: All right.

Mr. Taylor: Now, we have the Exhibit D, I think, which is entitled "Statistical analysis of work hours of longshoremen in the port of New York during the pre-war period indicated." You will see that the earliest entries relate to the year 1923 and the latest entries are for the year 1937. Here again the companies who furnished this information are indicated by symbols.

The Court: Are they the same ones?



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Mr. Taylor: They are not the same ones, and neither Huron nor Bay Ridge are included in this list.

Q. Now, Mr. Nolan, the fact of the matter is, is it not that the first study covering the ten months period in 1938 and 1939 was made up first covering the 17 companies? A. That's right.

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Q. After that had been completed or possibly while it was in process, War Shipping came back to you and asked you or the New York Shipping Association, perhaps, whether it would be possible to make a similar study for a longer pre-war period, and also a period which would be before the Fair Labor Standards Act? A. Yes.

Q. And that resulted in the chart which you now hold in front of you which is Defendants' Exhibit D, running from 1923 to 1937? A. Yes.

Q. In that instance you found a considerable difficulty, did you not, in finding companies who had preserved their records that far back? A. That is quite right.

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Q. Which accounts for the fact that in 1923, for example, you have only one company. That is true until 1931. In 1931 you get two companies. That is also true in 1932. In 1933 you get three companies. In 1934 you get six, and so on down, so that the most recent year of the study is 1937, when you have 11 companies?

Mr. Taylor: And the columns, if your Honor please, the headings and the relationships are the same in this study as they are in the other. I won't take the time at this late hour to comment on them, but I would like to offer two exhibits which have not yet been offered, which are in the nature of graphical presentations of the information on that chart, that is, relating to the ten months study from



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1938 to 1939 and the change in conditions between then and the war years with respect to which we will introduce a similar statistical study tomorrow through Dr. Reed.

Mr. Goldwater: Are they being offered in evidence?

Mr. Taylor: Yes.

Mr. Goldwater: They are definitely objected to. I do not think any proper foundation has been laid. I think that the witness who prepared them should be produced so that we may examine him concerning them.

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Mr. Taylor: I will not quarrel about that at this time.

Mr. Goldwater: We are handed these at the very last moment without any opportunity to examine them.

The Court: You do not have to apologize. The objection is overruled at this time.

Mr. Taylor: May I have them marked for identification, please?

The Court: You may have them marked for identification.

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(Marked Defendants' Exhibits G and H for identification.)

Q. I call your attention, Mr. Nolan, to another chart which has been marked Defendants' Exhibit F, which is entitled, "Relationship of contractual overtime to Wage and Hour overtime of longshoremen in the port of New York for payroll period nearest November 1, 1938, to payroll period nearest August 31, 1939."

Is it true that the 17 companies indicated by the 17 code letters in the lefthand column are the same com-



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panies covered in this other statistical study for the same period? A. As far as I know that is true.

Mr. Taylor: Calling your Honor's attention to that, you will observe that of the total number of men employed, only 8.01 per cent worked more than 40 hours in any work week. That is column No. 7.

It also appears that  $8\frac{1}{2}$  times—I am now referring to column 5— $8\frac{1}{2}$  times as much contractual overtime was paid to these men as would have been required under F. L. S. A.

The Court: In terms of hours and not in terms of dollars?

Mr. Taylor: Yes, this whole chart is in terms of hours. I will make further comments on that, but I wanted to get those particular figures into the record now.

Q. Mr. Nolan, the conditions with respect to overtime during the war were, to your knowledge, different from what they were in peacetime, isn't that true? A. As to volume of overtime work, yes.

Q. Why was that so? A. Well, it was simply and basically the necessity of dispatching the ships, working so far as possible around the clock every available hour. The ships had to meet convoy requirements. We were out to win a war, and every minute counted. It was not commercial operation by any means.

Q. The change in the amount of overtime, I take it, did not indicate any change based on a change in the industry; it was purely a war-induced situation? A. That's correct.

Q. Are we far enough beyond V-J Day or V-E Day so that you can tell us whether or not the industries have now reverted to the peacetime practices established by these statistical studies?



## Colloquy.

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Mr. Goldwater: Objected to as immaterial.

The Court: I will allow it.

A. It is gravitating in that direction gradually. There are still some governmental operations enduring, but where you get down to commercial operations, we will be getting back, and have in some cases already returned, to the status quo of this exhibit.

The Court: We will suspend at this time to 10:30 tomorrow morning.

(Adjourned to June 21, 1946, at 10:30 a. m.)

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New York, June 21, 1946;

10:30 o'clock a. m.

Trial resumed.

Mr. Goldwater: I wonder if Mr. Taylor will make the correction he was to make yesterday for the record with respect to the relationship between the so-called straight time and overtime in earlier years, which he said was always exactly 150 per cent. Subsequently he found he was in error.

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Mr. Taylor: Yes, it appears in the contract period October 1, 1931, to September 30, 1932, and again in the contract period November 4, 1933, to September 30, 1944, the general cargo straight time rate for longshoremen was 85 cents an hour and the overtime rate was \$1.20 an hour, 2½ cents less. In that connection I would like to hand to your Honor, if there is no serious objection, a sheet of paper on which this group of rate collective bargaining agreements, which make up one of the exhibits in the case, has been more or less tabulated and summar-



## Colloquy.

ized. Mr. Goldwater has had a copy of it for a long time. I do not offer it as an exhibit but for the convenience of the Court.

Mr. Goldwater: I hope that the error does not appear on this sheet, and I hope that Mr. Taylor is again as correct as he would like to be and is not in his recent statement to your Honor. The last statement was that the difference was  $2\frac{1}{2}$  cents. My calculations are that time and a half times 85 cents is  $\$1.27\frac{1}{2}$  and not  $\$1.22\frac{1}{2}$ , so the error is  $7\frac{1}{2}$  cents and not  $2\frac{1}{2}$  cents.

Mr. Taylor: All right, my heart is in the right place.

Mr. Goldwater: Yes, I have said that.

Mr. O'Grady: How about 1932?

Mr. Taylor: 1932. The contract for the years 1931 to 1933, the rates were 75 cents and  $\$1.10$ , which seem to me—all right, I won't make any comment.

Mr. Goldwater: There is where you have the  $2\frac{1}{2}$  cents difference.

Mr. O'Grady: How about 1934-35?

Mr. Taylor: That seems to be 95 and  $\$1.35$ .

The Court: I will take the schedule.

Mr. Goldwater: There again it is  $7\frac{1}{2}$  cents.

Mr. Taylor: O.K.

The Court: I will take this schedule as brief material and, of course, you can criticize it in your own brief material.

Mr. Goldwater: I am afraid we will have to check Mr. Taylor's patently bad arithmetic.

The Court: You may check it.

Mr. Goldwater: May I ask also in order to complete the record of yesterday, Mr. Taylor, whether you have a report from Mr. Iglehart on the statement he was to check and correct if necessary?



*Frank W. Nolan—For Defendants—Direct.*

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Mr. Taylor: I have not heard a word from him.

Mr. Goldwater: Would you like to make the correction yourself from your knowledge of the facts?

Mr. Taylor: I wonder if you think it embarrasses me to make corrections.

Mr. Goldwater: I am not trying to have you make corrections. I am trying to get the record correct, where the witness is obviously in error.

Mr. Taylor: You know the answer then.

Mr. Goldwater: I know the answer, but I cannot testify; but you can concede where a witness is in error. 410

Mr. Taylor: I have consulted the company and I have not yet heard from them. The moment I do I will let everybody know.

Mr. Goldwater: I am perfectly willing to let it rest at that and call attention to it at each hearing.

FRANK W. NOLAN resumed the stand.

Direct Examination (continued) by Mr. Taylor:

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Q. I think there is only one more question I would like to ask you. Can you tell us approximately, roughly, how many more ships cleared out of the port of New York during the wartime years than during the peacetime period preceding the war?

Mr. Goldwater: I object to that on the ground that that is immaterial and irrelevant.

The Court: I will allow him to answer.

A. My answer is four to five times the number during the war period than existed pre-war.



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The Court: Will you elaborate on that a little, how you calculate it as four to five times?

The Witness: Well, your Honor, it will become a matter of statistical record to show. I am drawing from my generalized knowledge to that effect.

The Court: Just what do you call a ship?

The Witness: Ships.

The Court: Oh, ships, all right.

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The Witness: And I would further emphasize that when I speak of ships during the war, we are referring to large cargoes in those ships. A Liberty ship will take 8,000 to 8,500 tons of cargo, whereas the cargo pre-war by and large I would imagine did not exceed 4,000 tons, perhaps less, of cargo handled by longshoremen.

Q. Isn't it also true that during the war years the vessels coming in and out of the port were more predominantly cargo vessels rather than passenger vessels? A. That is correct.

414

Q. During the war period what was the situation with respect to the facilities available for handling cargo in and out of vessels? A. You mean the pier facilities, I assume.

Q. Yes. A. We had actually less pier facilities to work with for cargo operations during the war than we had pre-war because certain pier facilities were taken over by the Army, the Navy, the Coast Guard and devoted exclusively to military purposes and not cargo.

Q. Did the circumstances under which you have just referred have some bearing on the amount of overtime that was worked during the war period as compared with the amount of overtime that is normally worked in peacetime?

Mr. Goldwater: I object to that as calling for a conclusion.



*Frank W. Nolan—For Defendants—Cross.*

415

The Court: I will allow it.

A. I would say yes.

Cross Examination by Mr. Goldwater:

Q. Mr. Nolan, on what did you base your statement that there was four or five times more ships during the war period than during peacetime in and out of the port of New York? A. My own familiarity with the movement of ships.

Q. Have you any records, have you had resort to any records prior to coming to court today? A. A matter of published record, not more than six or eight months ago, as to the extent of the volume of tonnage and dry cargo ships moving in and out of the port of New York. 416

Q. Will you tell us where the published record was, where you found it and where we can find it? A. That is my recollection.

Q. Where was the published record? What published record are you referring to? A. Newspaper record.

Q. What newspaper? A. That is a difficult thing to put my finger on at the moment.

Q. I am asking you the source of the information. A. My own knowledge. 417

Q. You said a moment ago your knowledge was based upon a statement you saw in the newspaper, is that a fact? A. No, it is my own knowledge, plus the statement in the newspaper, confirmed by the War Shipping Administration.

Q. Will you take the month of February 1944 and tell us what the tonnage was that passed in and out of the port of New York in that month. A. A great deal.

Q. Can you tell me how much? A. I cannot.

Q. Can you tell me how much it was in the month of March 1939? A. Quite obviously I have not the number of ships at my fingertips.



Q. And you have not the amount of tonnage either? A. No, I have not the tonnage.

Q. So that your statement is a pure generalized statement? A. Generalized, backed by familiarity with what is going on.

Q. But you have no recollection now of the figures? It is just general impression that you are relying on, isn't it? A. It is a matter that everyone in the port of New York knew.

Q. I am asking about what you knew, not what everyone in the port of New York knows. Suppose you confine your answers to your knowledge. I want to know what you base the statement on. So far as you told me it was in newspapers you saw, and now you tell me it is your general familiarity. Is there anything more specific than that? A. Yes, I think this will possibly convince you, if you need convincing. Every pier in the port of New York was occupied with ships during the war period, which was distinctly different than that which obtained pre-war. Piers which were practically idle for months, in some cases years, pre-war, were occupied by harbor ships working during the war period.

Q. Will you tell us which piers were idle for months or years prior to the war? I would like to know. A. The East River piers, several of them for a starter.

Q. Give us the numbers, will you? A. Pre-war very little activity at Piers 6 and 8 East River, Pier 19 East River, Pier 27 and Pier 28 East River, Pier 33 East River, and I can continue on with some other piers in the port, if you would like to know that.

Q. Yes, I would like to know. A. Piers on Staten Island were nearly idle pre-war, Piers 9 and 10. I think we could take some others.

Q. You said for how long a period of time, do you mean for months or for years those piers were nearly idle? A. In some cases months, in some cases years, there was no activity in there.



*Frank W. Nolan—For Defendants—Cross.*

421

Q. You cannot tell us which months or which years, can you? A. I could not give you the specific months of the year. I knew that the East River with few exceptions was an idle area pre-war, with the exception of about 5 or 6 piers. The rest was open.

Q. Your estimate of four or five times as much tonnage passing through the port is based upon this general information that you have, is that right? A. That is right.

The Court: Did you do four or five times as much business during the war as you did before the war?

422

The Witness: No, I do not think we did, your Honor.

The Court: What would be your ratio?

The Witness: My estimate would be  $2\frac{1}{2}$  times.

The Court: Tonnagewise?

The Witness: Cargo tonnage, yes.

Q. You have said in answer to Mr. Taylor's questions that there was a difference in the conditions of employment in the industry. I am talking about, of course, the longshoremen. You have said that there was a difference in the conditions of employment in the industry prior to the war and during the war, is that right? A. Difference in employment? Will you elaborate on it?

423

Q. I mean in the volume of employment, in the hours worked, in the number of teams. A. A great increase in the overtime hours you mean?

Q. Yes. A. Overtime and straight time?

Q. Yes. A. That is right.

Q. Did the peacetime conditions as to the method and practice of employment, apart from any change in the sense of rates, continue almost the same, substantially the same, from 1925, let us say, up to the time of the war?

A. That is a question I cannot understand.



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*Frank W. Nolan—For Defendants—Cross.*

Q. Perhaps it is not clear, but I will try to make it clearer, Mr. Nolan. I would like to know whether there was any substantial difference in the conditions of work of the men with respect to the manner in which they were employed and the manner in which they worked and the manner in which cargoes were handled by the stevedoring companies, between 1928 and the commencement of the war. A. The ships were still ships, and the cargo was still cargo, and the lighters were still lighters? What do you mean by the manner in which they worked?

425

Q. I mean did the stevedoring companies' operations with respect to its employment of their men and their management of the cargo handling change any between 1925 and the war? A. I cannot recall general changes, except in the agreement.

The Court: Call his attention to particular things you have in mind. Do you mean increased mechanization? Do you mean increased employment relationship?

426

Mr. Goldwater: I am talking about employment relationship. I thought I made that clear. I am talking about the employment relationship between the stevedoring companies and the men.

The Court: Were the men still employees of the stevedoring companies?

The Witness: Yes, sir.

The Court: They were not hired as agents for some other employer?

The Witness: No, sir.

Q. Were the men during that period from 1925 until the commencement of the war hired in the same manner, that is, by the shape-up manner? A. That is right.



*Frank W. Nolan—For Defendants—Cross.*

427

Q. And were the conditions which have been described with respect to finishing a job with a group of men at a hatch, carrying them into overtime if necessary, were those conditions the same? A. Approximately.

Q. During that period? I am talking about approximately. A. Yes.

Q. There was no substantial difference in that, that is, you carried men over who worked in the daytime in the night, where you were finishing up, is that right? A. Yes.

The Court: Except that it happened more often, according to your previous testimony?

428

The Witness: Yes, sir.

Q. Apart from the fact that it happened more often during the war, was there any substantial change in any of these conditions between 1925 and 1940? A. A great deal more night work during the war.

Q. Yes, but I am talking about the period prior to the war. A. No.

Q. Was there substantially the same amount of night work between 1925 and 1939? A. With the exception of the ups and downs, the dips of the steamship business, I would say generally the same.

429

Q. That is what I mean. I am not talking about trivial differences, the conditions which may have been slightly affected from month to month by the fact that you had more cargo than another time, nor am I talking about any differences that there might have been between a rate of 85 or 90 cents straight time or \$1.20 to \$1.25 overtime. I am not talking about such differences. A. An improvement in terms and conditions of the agreement?

Q. Yes, there may have been changes in the conditions of the agreement? A. That is right.



430

*Frank W. Nolan—For Defendants—Cross.*

Q. Let me ask you this, how long were you connected with the New York Shipping Conference, did you say?

A. Eight years, 1937-1938.

Q. Did you participate in the negotiations for the union contracts from 1937 or 1938, whichever it was, up to the time of this last contract? A. That is correct.

Q. You participated in all of those? A. Yes.

431

Q. I would like to take a question which his Honor asked yesterday and follow through on it. I understood—I am not clear whether this question was directed to you or another witness. If it was not I direct the question to you now. Assume a man worked 8 hours on a night shift during a night period for five days, which would be 40 hours. As I understand the arrangement in the port the men got \$1.87½ an hour for each hour during 1943, 1944 and 1945? A. That is right.

Q. Is that right? A. Yes.

Q. If that man worked on Saturday morning, how much do you say he was paid customarily in this port?

A. His regular rate of pay, normal rate of pay, \$1.25.

432

Q. Now, will you assume, as I think we shall show by the record it did occur, that a man worked 10 hours a night for 5 days, making 50 hours, how much was he paid for each of those hours? A. According to the agreement \$1.87½. He was already being paid the overtime rate.

Q. And he got no different pay for the last 10 hours than he did for the first? A. He worked no other overtime.

Q. All right, and on Saturday morning if he worked again, the same man, he would still get \$1.25? A. That is right.

Q. Am I to assume your answer would be the same if a man worked 10, 12 or 14 hours during the night and then worked Saturday morning following? A. That is correct.



*Frank W. Nolan—For Defendants—Cross.*

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Mr. Taylor: Mr. Goldwater, for the purpose of making sure the record is not confused, you will allow this addition to it, will you not, that in all these questions that you have just been asking Mr. Nolan, you have assumed that no straight time was worked during that same week.

The Court: That is right. It assumes only the terms of employment in the question.

Mr. Goldwater: Assumption that he worked five nights at 10 hours.

Mr. Taylor: That is correct.

434

Mr. Goldwater: I would have given him any other hours a man worked if that was implicit in the question.

Mr. Taylor: O. K. You are not assuming that he had worked any 40 straight time hours during the same week, but only the nighttime hours to which you referred, is that right?

The Court: That is right. The question is plain.

Mr. Goldwater: There isn't any question about the intent of the question.

435

Q. If a man worked 8 hours on Monday between the hours of 8 and 5, and worked four days, four nights, rather, 10 hours a night, and Saturday morning; would you tell me what rates of pay the man would receive for each of those hours worked?

The Court: Do you want a piece of paper to figure it out?

The Witness: No, I can give the answer. It is not too complicated. The 8 hours of Monday between 8 a. m. and 5 p. m. would be at the normal rate of pay.



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The Court: \$1.25!

The Witness: Correct, sir. And Saturday morning the same. And for the hours worked at night would be the overtime rate of \$1.875. It seems immaterial whether he has worked the overtime before or the overtime after, he is getting his overtime.

Q. That may seem immaterial to you, Mr. Nolan; it may not be so to us. A. Thank you, sir.

437

The Court: In any event, that was the practice in the industry?

The Witness: Yes.

Mr. Goldwater: That is all I wanted to establish.

Q. Now may I ask you finally, Mr. Nolan, if a man worked 20 hours during the night period, that is after 5 p. m. at night, on two or three or four nights during the work week beginning Monday and ending the following Sunday night, he would receive for each of those hours, as I understand you, \$1.875? A. Had he worked no other hours?

Q. No. A. Just the 20 hours?

438

Q. Just the 20 hours after 5 p. m. at night. A. No other work during the week.

Q. No other work during the week? A. \$1.875.

Q. All right.

The Court: Do you ever pay a man at a rate of \$1.25 for more than 40 hours' work?

The Witness: No, sir.

Mr. Goldwater: May I have that question?

Q. (Read.)

The Court: Do you follow my question?



*Frank W. Nolan—For Defendants—Cross.*

439

Mr. Goldwater: No. I don't think that is consistent with the witness's answers previously, that is why I am confused.

The Court: The question was do you ever pay a man the \$1.25 rate for a number of hours in excess of 40 hours? In other words, is the man's pay ever less than 40 times—at any rate I think the question is clear, but let's restate it.

Mr. Goldwater: Well, let's see. I would like to follow that up.

The Witness: May I say, your Honor, you intended you never pay 44 hours at \$1.25.

440

The Court: Do you ever pay a man 41 hours at \$1.25, or 42 hours at \$1.25?

The Witness: Pay them 40 hours for day work at \$1.25, and any excess beyond 40 straight time hours he receives \$1.875.

The Court: All right. That is the question I wanted to get.

By Mr. Goldwater:

Q. Now let's see: When the man worked 5 nights 8 hours a night, he had worked 40 hours, Mr. Nolan, had he not?

441

A. At \$1.875.

Q. That is right. A. Overtime rate.

Q. And on Saturday morning he worked 4 hours, which would be the 41st, 42nd, 43rd and 44th hours of work in that week, is that right? A. To me it is his first, second, third and fourth normal time hour.

Q. No; would it be the 41st, 42nd, 43rd and 44th hours that is worked by the man in that week?

The Court: We are getting into semantics. You want to know what would you pay for those 4 hours, and you may ask that question.



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*Frank W. Nolan—For Defendants—Cross.*

Mr. Taylor: He has already asked it.

The Court: Yes, I thought he had, but he can answer it again. You pay \$1.25 for those hours?

The Witness: Correct, sir.

Mr. Goldwater: I am asking this witness if those 4 hours are not the 41st, 42nd, 43rd and 44th hours' work?

The Court: I will settle that issue.

Mr. Goldwater: I think it is a very important question, your Honor, and the witness can answer it.

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The Court: I know, but I won't be guided by his answer on that question.

Mr. Goldwater: Maybe your Honor will not be, but a superior court may be, and it seems to me that is a factual question and the witness should be required to answer it.

Mr. Taylor: We don't need to waste time on that sort of thing. We all can count and know 41 is beyond 40.

The Court: Sustained. I don't mean to foreclose my answer to the question, but I think that is a question which goes to the issues of this case.

444

Mr. Goldwater: I understand that, but your Honor's answer to the question can be only one thing.

The Court: That may well be, but it is going to be the Court's answer, not the witness's answer.

Mr. Goldwater: I think still, your Honor, that that is a matter of fact.

The Court: Well, I have taken note of the fact. It is already in evidence that the work week began Monday morning and ended on Monday at 8 a. m. or 7:59 and 59 seconds a. m. I am aware of all that. And if rotational time is the standard, then it is the 41st, 42nd, 43rd and 44th hour; if it is not rotational time which is crucial, then it doesn't make



*Frank W. Nolan—For Defendants—Cross.*

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any difference. I don't know the answer to those questions, but the answers will have to be a judicial and not a witness's answer.

Mr. Goldwater: Your Honor said it is was not necessary to take an exception to rulings.

The Court: You are quite right.

By Mr. Goldwater:

Q. Mr. Nolan, in your general experience in this industry for a number of years, as you have described it, have you become cognizant in a general way of the accident rate in the business? A. In general.

446

Q. What would you say about the ratio of accident at night to accident at day? A. You know, counsellor, we have had a strange idea that accidents would be very frequent at night. The statistics do not support it.

The Court: In other words, your answer is that the accident rate is not higher at night than by day? That is what you want to answer?

Mr. Goldwater: I am not surprised at the answer, your Honor, and I would like the witness now to square it with his testimony that there is greater fatigue when a man works at night.

447

The Witness: Greater fatigue?

Q. Yes; haven't you so testified, Mr. Nolan?

Mr. Taylor: I object.

A. No, I have not so testified.

Q. Oh, you have not? A. No.

The Court: The objection is overruled. Now put your next question, and let him answer the question you put.



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*Frank W. Nolan—For Defendants—Cross.*

Q. Do you say you have not testified that the man working at night suffered greater fatigue than the man working in the day? A. I said after a normal 8-hour day if they run into overtime you are getting into a fatigue period. The Judge asked me how about that case of a man starting at 7 o'clock at night.

Q. Yes, and what did you say as to that? A. I said the same ratio of elapsed period of 7 or 8 hours, if that continued on beyond it they should have the same.

449

Q. And you would say that the man could work as efficiently beginning at 7 o'clock in the evening as the man who started at 8 o'clock in the morning? A. We contend that we do not think any overtime is efficient.

The Court: How about night work not overtime, in other words the man who works regularly at night.

Mr. Goldwater: I said men starting at 7 o'clock at night.

The Court: Is that as efficient as men working the day shift?

The Witness: No, sir.

450

The Court: It is not as efficient.

The Witness: No.

The Court: For reasons of fatigue or for other reasons?

The Witness: It is a matter of preference as to whether they work day or night, and certain men elect to work at night.

The Court: No, you are not answering my question. Do longshoremen as a species of human beings suffer greater bodily deterioration at night, or are they as physically productive at night, assuming they slept during the day, as when they work by day and had slept during the night?



*Frank W. Nolan—For Defendants—Cross.*

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The Witness: We always get better work during the day.

The Court: You get better work during the day. And you don't know for what reason?

The Witness: Well, we know the operation can be policed better, supervised better, and there are numerous factors entering into it.

The Court: You are not attributing the difference to physiological differences?

The Witness: In generalities I would not, your Honor.

452

The Court: At least you don't know?

The Witness: No.

The Court: You are not a physician?

The Witness: No.

Q. One of the defendant's witnesses has said that in spite of improvements in lighting that the lighting was not as good at night and that that affected the efficiency of the work. A. It is not as good as daylight, we can all see that.

Q. Do you think that affects the efficiency of the work? A. Yes.

453

Q. You do? A. I would think it would.

Q. Would the lighting not being as good as day contribute the possibility of greater accident at night than in the daytime? A. One would think so, but the records apparently do not support it.

Q. It doesn't seem so. You do subscribe, however, to the position that the men prefer day work to night work? A. Yes, sir.

Q. What records do you have reference to when you said that the records do not support the fact that one would have expected, that there was a greater accident ratio at night than in the daytime? A. Well, a general



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*Frank W. Nolan—For Defendants—Cross.*

examination of when accidents happen. We know when they happen currently.

Q. I mean were you referring to any specific records of accidents? A. No.

Q. In any particular year made by any particular agency? A. No, sir.

455

The Court: So possibly you are in error and have formed your opinion simply on the basis of the fact that more cargo is moved by day than by night, or had you admeasured the incidence of injury in relationship to the volume of cargo moved?

The Witness: No, I don't think that we boiled it down, your Honor, to the incidence against the number of man-hours, it is just the number of accidents you have at night as compared to those during the day.

The Court: Well, you would expect a smaller number because the volume of activity is smaller?

The Witness: Yes, sir.

456

The Court: So you really don't know whether the accident rate is higher, scientifically calculated?

The Witness: Correct.

The Court: I imagine there ought to be Government statistics on these things.

Mr. Goldwater: Yes. I wondered whether the witness had had recourse to them. That is why I asked.

The Court: Or the insurance companies may have statistics.

Mr. Goldwater: I am sure we can find them.

Q. Mr. Nolan, are you familiar with the instruction sheet of which the defendants' counsel has furnished us



*Frank W. Nolan—For Defendants—Cross.*

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a copy, which was dated February 24, 1945, in connection with the preparation of Defendants' Exhibit D in evidence? I will show you the copy to which I am referring, the photostatic copy which was furnished me by Mr. Taylor. A. Yes, I am familiar with that.

Q. That has reference to one of the exhibits which Mr. Taylor showed you yesterday? A. Yes.

Q. You are familiar with that? A. Yes. I can't remember all the details.

Q. Oh no, I don't expect you to: I just wanted to know if you had familiarity with it. This particular copy which I have happens to be addressed to Mr. Sellers, vice-president of your corporation? A. Correct.

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Q. And I assume that one similar to this was sent to each of the companies which are designated by letters on the exhibit?

Mr. Taylor: May I see what you have, please.

Mr. Goldwater: Yes (handing).

Mr. Taylor: Thank you.

Q. Did you answer that question, or do you know? A. I said I had general familiarity with it.

Q. Well, I asked you whether you know whether a letter similar to this, the same instructions, was sent to each of the companies which are designated by a letter on the exhibit that was shown you yesterday, Exhibit D? A. I don't know. I can't so state.

459

Q. Had you anything to do with the selection of the language or the material that was called for—the language in this letter or the material that was called for in this letter of instructions?

Mr. Taylor: I object to the question because of its form. You have two questions in one there.



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*Frank W. Nolan—For Defendants—Cross.*

Mr. Goldwater: Well, I will separate them.

The Court: Spread them out.

Mr. Goldwater: Oh, of course.

Q. Had you anything to do with the selection of the language which was employed in this letter of instructions? A. No.

Q. Now, had you anything to do with the designation of the material called for in this letter of instructions? A. No.

461

Q. Do you know who did decide what material would be called for from the companies which is now collated in this Exhibit 4? In other words, who prepared this letter? A. I don't know.

Q. You don't know? A. No. I don't recall. I don't see the letter. May I see the letter?

Q. Of course (handing). A. I should say you should ask the man who signed the letter, counsellor.

Q. Well, let's see, Mr. Nolan.

By the Court:

Q. Did you have anything to do with it? A. I knew of the query to be sent out, your Honor.

462

Q. Did you have anything to do with the preparation of this investigation? A. No, sir.

The Court: All right.

By Mr. Goldwater:

Q. Do you mean to say, Mr. Nolan, that you had no conferences with Mr. Taylor, Mrs. Schleifer or anyone else representing the War Shipping Board prior to sending out this letter, with respect to the material that was to be asked for in it? A. I personally did not.

Q. You had no such conferences? A. No.

Mr. Goldwater: That is all, sir.



*Frank W. Nolan—For Defendants—Re-direct.*

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Re-direct Examination by Mr. Taylor:

Q. Mr. Nolan, you still stand by your answer yesterday, do you not, that you talked with Mrs. Schleifer and Professor Smith and other people with respect to the selection of the 17 companies? A. Correct, sir.

Q. And when you answered Mr. Goldwater as you did just now, is that because you thought he was asking you whether you had anything to do with the details—

Mr. Goldwater: Here I ask that Mr. Taylor again from now on refrain from testifying. Ask questions. 464

Mr. Taylor: All right. I think it is sufficiently covered.

The Court: It is clear enough. You are excused. Is there anything further of Mr. Nolan.

Mr. Goldwater: I would like to ask the witness something.

Re-cross Examination by Mr. Goldwater:

Q. You did have something to do with the selection of the 17 companies to whom this letter where their names appear was addressed? A. I did. 465

Q. Did you suggest the names of the companies? A. I did.

Q. For what purpose did you select the names? A. Because Mr. Lyon of the New York Shipping Association and Mrs. Schleifer had indicated the summary of the details that were to be prepared.

Q. And in advance of the selection of the names you were told the material that was going to be asked for, weren't you? A. Just as to a summary of the dates, to find out which companies represented a certain volume of business in the port.



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*Frank W. Nolan—For Defendants—Re-cross.*

Q. Well, could you be more explicit as to that? I don't quite understand it. A. Well, I testified yesterday that the 17 companies represented 70 per cent of the volume of business in the port.

Q. Yes. A. And I was asked to indicate the companies that could make up a substantial segment of the port's activities.

Q. I see; and that is the only question that you were asked concerning this. A. Well, you referred to me having something to do with the preparation of this letter—

467

The Court: Forget about that now. You were asked for the names of substantial participants in the stevedoring business in this port?

The Witness: That is right.

The Court: Over a period of time.

The Witness: That is right, in certain brackets.

The Court: Certain brackets, meaning what kind of brackets?

The Witness: Per year.

The Court: Oh, time brackets?

The Witness: Yes, but that was because some had been busy in the pre-war and others were not busy.

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Mr. Goldwater: Well now, the purpose of my inquiry, Mr. Nolan, I thought was clear. Now I would like to know whether it was indicated to you, when you were asked for the names of the companies, what information the companies were going to be asked for.

The Witness: Well, most emphatically I knew what they were going to be asked for.

Q. Oh. Well now, what were you told they were going to be asked for? A. That they were going to be re-



*Frank W. Nolan—For Defendants—Re-cross.*

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quired to submit data of employment during straight time and overtime during certain periods pre-war and possibly during the war.

Q. Were you told as to the form in which they would be asked to supply it—I mean as to breakdown? A. In generalities.

Q. Were you told that they would be asked to supply what number of so-called overtime man-hours also involved man-hours worked during each of the following straight time periods: A, from 8 to 6 straight time hours; B, from less than 6 to 4 straight time hours; C, from less than 4 to 2 straight time hours; D, from less than 2 to no straight time hours; and E, no straight time hours. A. Well, you are reciting there. I assume that was discussed. 470

Q. Well, I am asking you whether you recall now whether you were told at the time that each of the companies whose names you gave to Mr. Taylor or Mrs. Schleifer were going to be asked to break down the information into those several groups? A. At the time that was being discussed, counsellor, we were asked to get together the information of these companies, X number, representing a substantial segment of the port's activities. 471

Q. Yes? A. And they would be required by the New York Shipping Association to present data of a certain technical nature, and all of that was reviewed, in so far as those companies are concerned, and some could not give it and others could give it, and those companies were segregated as to volume to create and submit a factual record which was ultimately compiled.

Q. I ask you, Mr. Nolan, whether you recall whether, when you discussed the matter with Mrs. Schleifer and whomever else you discussed it with, you were told that



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*Frank W. Nolan—For Defendants—Re-cross.*

the information to be supplied would be asked for in the breakdown as I have given it to you in hours? A. I say so in generalities. That is my recollection.

Q. Now then I will ask you, didn't you understand my question ten minutes ago when I asked whether you were consulted with respect to the material that was going to be asked for? A. As I interpreted your question, did I have to do with the preparation of that letter?

The Court: Or the material that went into it.

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The Witness: So I said you better ask the man who signed the letter.

The Court: The intimation being that you did not prepare the material?

The Witness: I did not prepare the letter.

The Court: Or suggest the material?

The Witness: No, sir; I simply discussed with the people who were seeking the material.

474

Q. You say now that you did in advance of the sending out of this letter, when you supplied—at the time that the names were supplied, discuss the material which was to be asked for? A. That is correct.

Q. Now do you recall now distinctly enough to say whether you were told why the companies would be asked for the number of overtime man-hours which also involved man-hours worked during the period from 8 to 6 straight time hours? A. Yes.

Q. Do you know why they were asked for that particular breakdown? Was that said at that time? A. I have a recollection, but not quite clearly, of why they wanted the 6 hours, 4 hours and 2 hours.

Q. Was there any discussion about whether or not you should ask for the number of overtime man-hours worked by men who also worked 8 hours, specifically 8



*Frank W. Nolan—For Defendants—Re-cross.*

475

hours rather than 8 to 6 hours straight time? A. I can't recall.

Q. You don't recall? A. I can't recall why. It may have been clear then, but I don't recall it now.

Q. And you don't know why there was segregated out the group who worked 8 straight—8 straight time hours, not less than 8, but just 8 straight time hours and over-time after that? A. I cannot remember.

Q. And you do not recall specifically now any conversation concerning whether that information should be asked for as segregated from information with respect to the 8 to 6 group? A. I can't just now.

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Q. I assume what you mean is that you have no recollection of what if anything was said on that line, is that what you mean? A. I can't recall the reason for asking that, counsellor.

Q. Well, can you recall now anything that was said on that subject at that conference or more than one conference, if more than one took place? A. As I recall, it was simply seeking to find how many men had continued on from a straight time period into overtime, and you are bringing it down to the point whether they worked exactly 8 hours and continued on into overtime and worked four or six hours and then overtime.

477

Q. That is correct; I want to know whether you can recall anything that was said at any—at a conference or any conferences concerning this material, with respect to the group of men, a segregated-out group, who worked exactly 8 hours straight time and overtime after that? A. I can't recall.

Q. You can't recall any conversation concerning that? A. At that particular time, no.

Mr. Goldwater: That is all, Mr. Nolan.

(Witness excused.)



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*James B. Young—For Defendants—Direct.*

The Court: I haven't had a chance to go over the exhibits yet in detail. Do the exhibits show the precise working schedule of the plaintiffs in this case—I mean which hours they worked and which days and so on?

Mr. Goldwater: Yes, they show it to a limited extent; they show it to the extent that Mr. Taylor could supply it. That is, they show weeks and they show a long period of time with respect to some of the plaintiffs.

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The Court: They show when they worked daytime and—

Mr. Goldwater: And then show whether they worked daytime or nighttime by a code letter.

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JAMES B. YOUNG, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination by Mr. Taylor:

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The Court: I may suggest that a good deal of material has now been covered. Cumulation is hardly necessary.

Mr. Taylor: I will be very brief, your Honor.

Q. Where do you live, Mr. Young? A. Little Falls, New Jersey.

Q. What is your business? A. I am in the steamship business.

Q. What company or companies? A. Barber Steamship Lines, Inc., American-West African Line, Inc.

Q. The only question I want to ask you is, if you are able to answer it, if you have enough familiarity of the



*James B. Young—For Defendants—Direct.*

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character to answer it, as to the ratios of straight time and overtime in this port as between operations involving passenger ships on the one hand and operations involving cargo ships on the other hand?

Mr. Goldwater: I object to that as entirely immaterial to the issues here.

The Court: I will accept it. That has been gone into a number of times. I will let him answer.

Q. Do you understand what I want to know? A. I don't quite follow your question, Mr. Taylor.

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Q. Is there any difference in the amount of overtime worked handling cargo ships and the amount of overtime that is worked on passenger ships?

Mr. Goldwater: Objection on the ground stated. The Court. Overruled.

A. I should say so, very definitely.

Q. Can you give us an idea how much the difference is, and will you please tell us why. A. Well, my answer would be that with general cargo, say, the importance of working overtime is not nearly so great as it would be in the case of passenger ships. While we have not handled many passenger ships, I do have a general knowledge of the activities at piers where the passenger ships are berthed.

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The Court: In other words, your answer is that there is more overtime worked in normal times on passenger than there is on cargo ships?

The Witness: Yes.

Q. Your lines are mainly cargo carrying lines? A. Yes, with a very limited number of passengers, 14 at the most per ship.



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*James B. Young—For Defendants—Cross.*

Q. Is there a stevedoring company known as the Atlantic Stevedoring Company? A. Yes.

Q. Associated in some way with the Barber Steamship Lines? A. That is an associated company of the Barber Steamship Lines.

Q. They do the stevedoring for the Barber Lines? A. At our terminal, yes.

Q. Do you know if they do contract stevedoring also, or do they work exclusively for Barber? A. Exclusively for Barber Steamship Lines and American-West African Line.

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Mr. Taylor: I would like to add, for the purpose of the record, that on the statistical charts relating to the studies of the experience of the 17 companies the code reference for Atlantic is "CA". That is all for this witness.

Cross Examination by Mr. Goldwater:

Q. Mr. Young, would the answers which you gave to Mr. Taylor with respect to passenger ships and cargo ships generally, and the incidence of overtime, pertain throughout the period, let us say, from 1925 to 1940?

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A. Yes.

Q. There would be no substantial variation during that period in the incidence of overtime with respect to passenger and cargo ships? A. You mean on the general relativity?

Q. That is right? A. I would not say so.

Q. You would not want to distinguish any one or two or three years in the period 1925 to 1940 where conditions for some reason would make a difference? We know that it is substantially different now, of course. A. Well, there were economic considerations, of course.

Q. Yes, there was that, and perhaps the vessels were a little more full in one year and less in another year;



*James B. Young—For Defendants—Cross.*

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those things occur. A. To make myself clear and state what I mean is that the emphasis on overtime on cargo ships is nothing as compared with the emphasis on passenger ships.

Q. I understand; and that emphasis, or the degree of emphasis was approximately the same between 1925 and 1940, throughout those years? A. I should say it is a general emphasis, without regard to any particular period.

Q. Yes. All right. Now as between the period up to 1940, or 1939, we will say, prior to the war, and the period after the commencement of the war, what would you say of the relationship? A. Well, the period after the commencement of the war was, needless to say, one of abnormality and one over which the individual steamship company as such had little or no control. As has already been testified, we were involved in a very serious war, which dictated the necessity of working ships beyond what would have been the case had normality prevailed.

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Q. And would you say that the only substantial change then, after 1939, was in the amount of overtime—there was more overtime, as witnesses have said? A. Oh, definitely.

Q. When you talk of the pressure of night time working, overtime, not being as great on passenger ships as cargo ships—

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Mr. Taylor: He did not say that.

A. I think that is the reverse.

Q. I am sorry. When you talk of the pressure of night work, overtime work, not being as great on cargo ships as on passenger ships, you refer to general information, not your own experience, do you not? A. No, I refer to my own experience, certainly as to cargo ships, and my general knowledge as to passenger ships.



Q. And your general knowledge as to passenger ships?  
A. Yes.

Q. Is that what you said? A. Yes.

Q. That is, you have no so-called real passenger ships in your lines? A. We do not operate a passenger line, if that is what you mean.

Q. Yes; you have these boats of 14 passengers to a ship, as a mere incident to your cargo carrying; isn't that it? A. Definitely; that is right.

Q. In your experience is it advisable, not to say essential at times, for a cargo-carrying line to commit itself as to deliveries of cargo, dates of sailing and so on? A. I would say that by and large that is more the exception than the rule; and if I may amplify what I have just stated—

Q. Of course. A. We in the general cargo business over long trade routes do not set up schedules saying that one month hence we are going to sail on Friday at 3:30. Our schedules of working a ship or our plan for working the ship is usually formulated after the vessel arrives safely back into port, and we can then forecast how we might best work the ship from the standpoint of cost and then we might advertise our anticipated sailing date.

Q. Your emphasis, of course, is on cost, as you have just indicated? A. Well, naturally; we are in business.

Q. And don't you begin to know what cargo you are going to have before the ship is safely back in port? A. Well, for a period of a couple of weeks before that. Not necessarily the volume, however.

Q. You don't mean to say that you don't have inquiries as to your ability to carry so many tons from a particular client or customer? A. Yes, but I am talking about the aggregate for the ship.

Q. I know. I know that you won't know, of course, until some time later what the total aggregate will be, but you begin to know, as my question says, before the



*James B. Young—For Defendants—Cross.*

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ships gets back into port what you are going to put on that ship? A. You mean the kind of cargo, or volume?

Q. I mean the volume; you begin to know something about the volume, get it accumulated, don't you? A. We have vision, possibly, as to what we may be able to get on the ship.

Q. Isn't it a fact that you do not get your first inquiries about your ability to carry a volume of cargo the minute the ship gets into port, and that it begins then and not a minute before? A. I don't quite follow what you mean.

The Court: In other words, you do have a rotational business; certain customers that you know you deal with pretty regularly?

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The Witness: Yes.

The Court: You anticipate their business, and when the ship comes in you have a pretty good idea that you will be able to send her back laden and not light?

The Witness: Well, laden to a certain extent, yes.

The Court: That is right. I think we will have to suspend, unless you are going to stop with another question.

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Mr. Goldwater: I won't have many questions, but I would just as soon stop.

(Short recess.)

Mr. Taylor: I would like to state for the record that on the large statistical table which contains information with respect to the period from 1923 to 1937, Exhibit D, the Code symbol A-1 refers to the Atlantic Stevedoring, Inc., which, as I pointed out earlier, is "C-A" on the table relating to the ten months' studies.



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*James B. Young—For Defendants—Cross.*

Mr. Goldwater: May I ask one other question, then; and perhaps, Mr. Taylor, I would like to ask you first is there someone in court representing the Atlantic Stevedoring Company?

Mr. Taylor: Only Mr. Young.

Mr. Goldwater: I thought perhaps you would produce somebody,

Mr. Taylor: No.

By Mr. Goldwater:

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Q. I would like to ask, Mr. Young—I just wanted to ask whether there was any connection between the companies besides the employment connection which you have described. In other words, is there a subsidiary or an affiliate of your line? A. It is a separate corporation, associated with the Barber Steamship Lines.

The Court: Under common ownership?

The Witness: Under closed ownership.

The Court: Is it owned by the same people who own the Barber?

The Witness: The stockholders are not all identical.

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The Court: But they are the same family groups, and things of that kind?

The Witness: Yes, sir.

Q. Are you personally familiar, Mr. Young, with the operations of the Atlantic? A. Not entirely so, but in a general way.

Q. Are you familiar with its employment relations with its employees? A. Yes.

Q. Are you an officer of Atlantic yourself? A. No.

Q. What is the nature of your familiarity; what is the source of your knowledge? A. By association with the



*Joseph B. Ryan—For Defendants—Direct.*

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companies of which I am an officer, and what the Atlantic Stevedoring Company does for them.

Q. Do you have anything to do personally with the operations of Atlantic? A. No, not with the operations, no.

Q. Then all that comes to you comes through the officers of the Atlantic?

The Court: Whatever information you have you get from the officers of Atlantic?

The Witness: Yes, sir.

(Witness excused.)

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JOSEPH B. RYAN, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination by Mr. Taylor:

Q. Where do you live? A. 433 West 21st Street, New York City.

Q. You are the president of the International Longshoremen's Association, are you not? A. Yes.

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Q. And you have been since 1927? A. Yes.

Q. Will you be good enough to tell the Court what your connection has been with the I. L. A. since its beginnings, that is, since the time you first had contact with it? A. I joined Local 791 International Longshoremen's Association around March, 1912. I do not want to burden the record, Judge, but I would like to say that for eight years previous I worked on the streetcars, from conductor to inspector, which was practically a 12-hour day, and that is why I got out of that business and joined Local 791 and worked as a longshoreman.



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In 1913 I was elected financial secretary at \$1 a meeting, to take care of office, and in 1916 I was continued in the office of financial secretary, but I got a steady office at \$30 a week, because the Local could afford a business agent and a secretary, and I was chosen, and the job I was in made a permanent position. I was made a delegate to the District Council of Local 791. The District Council is the governing body in each port. We have one District Council here, your Honor, covering all of the port of New York, New Jersey—what is known as the port of New York. I was delegate to the Council and was elected treasurer.

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Finally, in 1918, I became president of the Atlantic Coast District, which runs from Halifax, Nova Scotia, to Hampton Roads, and I held that office ever since, purposely, because the Atlantic Coast District negotiates the agreement on the Atlantic Coast, and that is why I have held that office until the present. So that in spite of the fact I am president of the International I am still president of the Atlantic Coast District, chairman of the Wage Scale Committee each year, and I was elected eighth vice-president of the I. L. A., the International organization, in 1919, and in 1921, when Mr. O'Connor went with the United States Shipping Board I moved up to first vice-president, and then was elected in 1927 as the president.

Q. Is the I. L. A. the only union in the port of Greater New York covering the longshore industry? They contract for the longshoremen in the entire port of Greater New York? A. Yes.

Q. And the contracts, as they are negotiated year by year, or every other year, whenever the case may be, are negotiated between the I. L. A. and who else? A. From 1915, when we secured our first agreement, the shipping interests in the port of New York were known as the Transatlantic Steamship Conference Committee, and we



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made yearly agreements with the Transatlantic Steamship Conference Committee until they were changed into the New York Shipping Association. I should judge about ten years ago we got into the practice of making two-yearly agreements, with the clause in each agreement that either side could reopen the wage scale question by serving notice on each other on September 1st. The agreement expired on September 30th. On the 1st of September of each year either side may reopen the wage scale question only.

The Court: Is the New York Shipping Association the only other contracting party to these collective bargaining agreements? 506

The Witness: Yes, sir. Some companies do not belong to the New York Shipping Association, but after the agreement is made between the International Longshoremen's Association and the New York Shipping Association we go to those companies. There are not many. And we ask them in substance, "Are you willing to sign the same agreement as has been signed by the New York Shipping Association?", and they do. So we have agreements with all of those companies that are not members of the New York Shipping Association. 507

The Court: Most of the stevedoring companies are members of the New York Shipping Association?

The Witness: All of the stevedoring companies in the port, as far as I know, are members of the New York Shipping Association.

In answer to the judge's question, the general longshore, the checkers and people that have been in our industry for many years, all of those steve-



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dores are members of the New York Shipping Association. Since the war we have gone into the maintenance business, and there are some other groups that may not be members of the New York Shipping Association; but the New York Shipping Association negotiates the agreements for them with our committees. Maybe some of those companies are not members of the New York Shipping Association, but they go along with the agreements.

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Q. Will you tell us whether or not, Mr. Ryan, the locals in the port also vote on the agreement? A. Absolutely. It is in our constitution that the Wage Scale Committee shall be selected each year by the locals from Portland, Maine, to Hampton Roads. They shall be elected in the month of August. Of course in the case of the Canadian ports, Montreal, St. Johns, New Brunswick, and Halifax, Nova Scotia, they negotiate with the Canadian Shipping Association. Our three vice-presidents up there handle that in each port, and their wages follow close to those in the American ports. But a letter is sent to every local office from Portland, Maine to Hampton Roads, to elect representatives to attend the Wage Scale Conference, which by our constitution is scheduled the day after Labor Day, in September.

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The Court: And they have to conclude the Wage Scale Agreement in negotiations?

The Witness: Absolutely. The Committee negotiates until they get as far as they can with the employers. In other words, the final proposition—sometimes the Committee as a group decide to go back and recommend to their membership. In the case last October they did not agree to recommend, but they have to agree to submit it back to the



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members before we can accept it from the New York Shipping Association.

The Court: So each member of the I. L. A. gets an opportunity to vote personally on the wage scale agreement?

The Witness: Absolutely.

Q. About how many union members have you in the port of Greater New York, Mr. Ryan? A. I would be more or less guessing at it, because, as I say, those affiliated crafts that come in that we are discussing our agreements with, generally talking about the general longshore agreement with the checkers and watchmen who are members of the same local, the cargo repairmen, of which there are a small number—they do cooperage work. We call them cargo repairmen, so we won't have jurisdictional trouble with the national cooperage union. So we generally know in peace time the membership of that group, and we quote a figure. But now, with all of these other groups such as the carpenters, not experienced carpenters, maintenance men and watchmen—in fact we negotiated eight agreements with the New York Shipping Association where we used to negotiate four for the maintenance men, the watchmen, and two branches of what we call the bull stealers, grain stealers and so forth. It is sort of carpenter work that the international carpenters union let us have.

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You asked me how many members. Of course the easiest way is to go to the tax book, but I have not got that record with me. But we figure that there are 30,000 of our men employed in the port of New York That is during war time. That now I think is reduced to 25,000 after the war.

Q. Having participated, as you have told us, as president of the Atlantic Coast District and ex officio chair-



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man of the Wage Scale Negotiating Committee since 1918 in all the agreements which have been worked out in that time, will you be good enough to tell the Court what the union objectives and purposes were, what they were trying to get at and trying to accomplish?

515

Mr. Goldwater: I object to the question as calling for an answer which is not relevant or material to any of the issues here. A written contract has been admitted in evidence by your Honor, and the contract speaks for itself. Anything leading up to its making it seems to me is entirely immaterial and irrelevant, and is entirely included within the final document.

The Court: For the reasons that I have already indicated I will allow him to answer. You may answer.

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A. Myself personally, and I presume with what every member of the organization wants, my own personal experience working 12 hours a day was too—when I went to work longshore in New York there were two organizations in the field, although the employers did not recognize either of them—what was known as the Independent Union, and in 1913 the heads of the Longshoremen's Union Protective Association, which was an initial organization in this port, and the I. L. A., which was trying to organize, got together and asked for a conference with the employers. This was not granted, but the employers that September—and that is how we came to negotiate the agreements in September—put signs on the piers that on October 1st the wages would be raised from 30 to 33 cents an hour. The overtime work was 45 cents, and the Sunday rate was 60 cents. We had three rates at that time. That was in 1913. So that gave especially the younger men coming on the waterfront,



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it gave us the idea that the minute we endeavored to unite we gained three cents an hour.

In 1914 we took over into our membership the entire membership of the Longshoremen's Union Protective Association. So that in 1915 President O'Connor came in from Buffalo as chairman of the Shipping Board, and he arranged a meeting with the Transatlantic Shipping Conference Committee, and I was a delegate from the District Council through that agreement in 1915.

The Court: I do not know whether this is the history Mr. Taylor wants or not.

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The Witness: He said from 1918, but I think what Mr. Taylor wants is what was our objective. Our objective was to de-casualize longshore work as much as possible, to have the work done in the daytime as much as possible, and make it as expensive for the employers as possible on Sunday. Before there was any union we had double time for Sunday. We wanted to work in the daytime. We figured we only live once. We want the daytime when every man who wants to work wants it done in the daytime and not during overtime. The employers would say it cannot be done in the steamship industry. I think we have proven for them that after 30 years of negotiating many of the things they said could not be done in the industry. when they found it too expensive to do it in any other way, have been done.

519

Q. Do the men object to working outside of a normal day? A. Absolutely.

Q. Will you give us some illustrations, and tell us why it is so? A. The men—of course bringing them from 30 cents an hour without a strike, right up to \$1.25 and



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\$1.875 an hour, wanted to work it from ten hours to eight. Incidentally, there are only two rates now. In the last war the employers, ourselves and the United States government arranged that our conditions would be set by what was known as the National Adjustment Commission. In the first year, 1917, there was on that Commission one of the employers, Mr. Tappan, our president Mr. O'Connor, and an independent man, Mr. Palfry. In 1918 that continued. In 1919 they made it a five-man committee—Mr. O'Connor, myself, Mr. Oakley Wood of the Barber, a Professor Ripley representing the United States government, and in 1917 their findings were that we would have two rates of pay. They gave us the 44-hour week, 8 to 12, 1 to 5 and 8 to 12 on Saturday, 65 cents an hour straight time and \$1 an hour for overtime, and that has been continued ever since.

521

In 1919 the war was over. We had done our job and the Commission was abolished, and we continued collective bargaining ever since, but now the two rates of pay—

The Court: You say there has not been a strike in the industry since when?

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The Witness: Since 1907, except in the coast-wise end of it. There has not been a strike in the deep sea since 1907, until what they termed the strike, in the first part of October of this year. The men never lost any time to gain wages or increases by a strike. There were stoppages of work, but never a strike since 1907 until 1945.

Q. Directing your attention again, Mr. Ryan, to the matter of whether the men do or do not want to work outside of the normal day, will you expand and amplify that a little bit? A. I can give you concrete evidence that that is the case.

Q. Go ahead. A. I will until I am stopped. I do not want to be guilty of misconduct in court.



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During the war, as the records show, we were all grouped together under the Collector of this port. Some of the questions that he asked Mr. Nolan this morning, we know they are facts, because the Collector of the port issued statements, but we do know we have been commended all over. We figured it was our duty to do the job. In the last war we manned what were known as stevedore regiments. We sent out experienced foremen overseas, under the army's guidance, and did a job. In this war they had what they call port battalions. We manned them and furnished them with some of our best men. The "P.Bs" and other groups of laboring men were sent in, and we received high praise for the manner in which our work was done, the volume of business, the tonnage turned out in this port, in this Atlantic Coast district as against other districts, which I do not want to go into.

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The men from 42nd Street to 59th Street—that is from Pier 84 to Pier 97—most of those men have moved out of that district due to the unsanitary conditions, and so forth. We have never been able to get so many things for the west side, but many of the men had moved out to Long Island, and they said, "Now, listen, we go in there and work like hell on these war cargoes", because we were handling a different cargo. Instead of coffee and flour, we were handling jeeps and all that sort of thing, and the men told their representatives up there, and the New York District Council, they said, "We cannot work day and night and do a job. We will come in at 7 in the morning, or we will come in at 8 and work until 6," for which there would be eight hours straight and one overtime. If they came in at 7, that was two hours overtime, and go home and be fresh the next morning "and we will be back at 8 o'clock in the morning." They said, "We want to knock off and go home." We knew there was additional labor needed on this waterfront. Many of our boys went, and we knew and hoped they were coming back to go into the industry again,

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and our agreement with the employers read that we would prefer them for work.

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We knew that there were men in Harlem and in Brooklyn who never worked longshore, who were being organized by people outside of our organization, who made plenty of money on those men. We knew there were some Southern ports that were engaged during the war, or before the war, on coastwise business. The War Shipping Administration took over all their ships, and those men were out of work. They came and lived in Harlem. Some were experienced men, but the average did not have experience, and the employers and ourselves found that out, and we tried to confine them to handling ballast or some of that bulk cargo, where they did not need experienced men. We did not take one penny from those men. We are very proud of that fact. We took nothing from them, because we figured when the war would be over our own men would come back and they would want their jobs back and we would have to tell those men to leave the waterfront.

528

However, we did know that some of those men were becoming experienced, and we issued two extra charters, one known as "824, Series 1, Uptown", and one known as "1258, Series 1, Downtown", in which we took some of those men that were acquiring experience. We took colored men into all of our locals, except one colored local that desires to be by itself. That has been in existence many years. They wanted their own local.

We took in a group of those men, and we got Harry Wills, and he got a salary for recruiting those men and putting them into those new locals. Later on uptown these men said they would not work nights. Then Furness-Withy and the rest of the people up there—the colored men had never worked in that section. But the employers said, "We will have to bring the colored men in and work nights." They said, "Let them bring them in and let them work nights."



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Now, Harry Wills has gone around to 1,000 or 1,200 men and gotten—

Mr. Goldwater: Now, if your Honor pleases, it seems to me that this is entirely irrelevant.

The Witness: I knew I was going to be stopped, but I was going to talk as long as I was telling the truth.

Mr. Goldwater: There is no question about your telling the truth. Nobody questions your telling the truth at any time. We want to restrict your testimony to what is relevant in the case.

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The Witness: I want to say this, if it is permitted, that the men that are arguing this suit are non-union members who do not know anything about how our organization was built up.

Mr. Goldwater: I say to your Honor that whether they are union men or non-union men is not material.

The Court: Strike it out.

The Witness: All right, I say it is that they worked overtime all the time; and that is what they want, time and a half on time and a half.

Mr. Goldwater: We will show that the records contradict what you say, Mr. Ryan, despite the fact that you tell the truth.

531

The Court: Obviously we are not going to get anywheres that way.

By Mr. Taylor:

Q. As I understand it, this story which you have just told us, you were going to give us as an illustration of the fact that the men in the union did not want to work at night, even in the wartime conditions, but they allowed these other men to come in and take the night time work because they did not want to work at night? A. Yes.



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Q. Will you please give us any further illustrations that occur to you that tend to support and corroborate your statement that the union does not want night work and the men do not want night work?

Mr. Goldwater: I object.

The Court: Sustained. Has the union ever taken any formal action on the matter?

Mr. Goldwater: I object to that as immaterial.

533

The Court: I will allow it, nevertheless. Well, I should say, to avoid any further discussion, that I always invite objections to any questions the Court puts. I gladly entertain such action. I overrule the objection.

Has the union taken any formal action expressing, by resolution or otherwise, an opposition to night work, other than the fact that it appears from the contract—

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The Witness: I would say in answer to that that while we may never have taken formal action on it, that the employers for about four years insisted on it going in the contract before we signed it. You know, in 1921 we got cut, or reduced, so much so that the employer was the boss. We either had to take that agreement or none. We done the best we could, and they put it in there; I mean for four years straight it was in there. The men would not work nights. You would not see any men, and then before they would sign an agreement with us they put it in there that the men must work every night of the week if required to do so, including Saturdays.

The Court: That is still in the agreement?

The Witness: I do not know, I guess it is carried ever since. That is the reason our men did not want to work nights, and they put that in before they would sign the agreement.



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Q. How about this clause, in the same part of the agreement, Mr. Ryan, which says that on Saturday night work shall be performed only for finishing a ship sailing on Sunday, or to handle mail or baggage?

Mr. Goldwater: I do not know what the question means.

The Court: Objection sustained.

Q. How did that clause happen to get into the agreement?

536

Mr. Goldwater: I object as immaterial.

The Court: Sustained.

Q. Was that clause put in at the request of the employers or the men?

Mr. Goldwater: I object to that as immaterial and irrelevant.

The Court: Yes.

A. The answer to that is the men were not working Saturday nights, and the employers put in there that we would at least work the mail and the baggage.

537

Q. There is a provision in here, Mr. Ryan, to the effect that if men who have not been employed on the premises in the afternoon are called back in the evening, they are supposed to get at least four hours pay? A. That is right.

Q. What is the history of that clause in the agreement?

Mr. Goldwater: Objected to as immaterial and irrelevant.

A. The employers had to give us the four hours, or they would not get any men.



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Q. That is, they did not want to come back to work just for a couple of hours; if they came back it was to be worth while? A. The employer had to guarantee us four hours, to any men around.

Q. What in your opinion, Mr. Ryan, is the purpose of the overtime provisions in your collective bargaining agreement?

Mr. Goldwater: I object to that on the same grounds.

539

The Court: I will allow him to answer it again.

A. Every labor organization, CIO or AFL, ourselves, tried to make night work so expensive that they will work in the daytime. That is the only answer to it.

The Court: I did not hear a motion to strike out.

The Witness: You cannot strike it out from our memories. I am not trying to be facetious, Judge.

The Court: I understand. I was.

540

Q. During the war, Mr. Ryan, was there a conference held here in this port for the purpose of deciding whether or not, in order to meet the wartime needs, you were going to work around the clock, or only part of the night, or how you were going to meet the problem most efficiently? A. I recall at least three conferences in General Groninger's office. He was head, at least three times during the war, of—

Mr. Goldwater: The question was whether there were any conferences.

The Court: The answer is yes.



*Joseph B. Ryan—For Defendants—Direct.*

541

Q. Will you please tell us what conferences? A. I was just saying who was president of the conference. I see now that Counselor Goldwater does not want that. I will say there was a Council called by Mr. Groninger.

The Court: Don't pay any attention to Mr. Goldwater.

The Witness: He is not going to wreck our organization.

Mr. Groninger, he would call all of us in. Our representatives were called in and the matter was discussed, and the War Shipping Administration kept insisting to work around the clock, the minute a ship comes in work it right around the clock, get it out, and sometimes a ship would lay there two or three days. We all the time resisted. We said we never want to get that habit for peace times of working around the clock, and if we establish it in war time it will be a precedent and they will follow it through. And we finally prevailed upon all of the interests not to work around the clock, only when it was necessary, absolutely necessary; to do as little night work as possible, so that the men would be fresh to do the work that they could do in the daytime. Several of those conferences were held.

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Q. Mr. Ryan, did it come to your attention that a suit was brought by some longshoremen up in Providence, similar to the suits which are brought here? A. Absolutely, it was called to my attention.

Q. In which they were seeking, as these men here seek, pay in addition to what they got under the terms of your collective bargaining agreement?

Mr. Goldwater: I object.



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*Joseph B. Ryan—For Defendants—Direct.*

The Court: Objection sustained.

Q. You knew about that suit, and you knew about this one, didn't you? A. I am afraid to talk to you, the objection will be sustained.

Q. When you learned that the suit had been brought up there, did the Council here take any action with reference to the matter? A. Our Atlantic Coast District—

545

Mr. Goldwater: Just a moment. I object.

The Court: I assume he is referring to "Council", with a capital "C".

Mr. Goldwater: I must ask that the question be repeated.

Q. (Read.) A. You mean the organization here? A. Yes.

Mr. Goldwater: That is what I did not understand, what organization he meant.

The Court: The I. L. A.

The Witness: It was the Atlantic Coast District.

546

The Court: Of the I. L. A.

Mr. Goldwater: I object to the question as entirely immaterial and irrelevant; what action was taken here on a suit brought elsewhere is entirely immaterial and irrelevant.

The Court: I am inclined to agree with you, but counsel has a right to put it on the record, so I will sustain the objection. But you may put it on the record.

The Witness: The Atlantic Coast District.

Mr. Goldwater: I do not understand your Honor's ruling.



*Joseph B. Ryan—For Defendants—Direct.*

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The Court: Under the Federal Rules of Civil Procedure when an objection is taken to a question counsel offering the question may nevertheless elicit the answer and put it upon the record, so that the Circuit Court can review the question.

The Witness: Thank God for that.

The Court: It is a practice which would not be suitable before juries, but you can see it is relatively harmless.

Mr. Goldwater: Is the stenographer permitted also to put on the record Mr. Ryan's asides? I think they are extremely important.

548

The Court: He is doing the best he can.

Mr. Taylor: I think a little wit in a dry case like this is a good thing.

Mr. Goldwater: That is why I want them.

The Witness: The judge says what the counsel's rights are; I do not know what mine are.

The Court: You just answer the question until I tell you to stop. The question is what action did the District Council for the I. L. A. for the Atlantic District take with respect to the suits.

The Witness: We were meeting every three months, the Atlantic Coast District executive board, at which every board is represented. When this question came up, about what happened at Providence, our Council went on record as being opposed to trying to get time and a half on time and a half, as it might wipe out all of the gains we had made for our men over a period of 25 years. We opposed the suit. It was mentioned—of course that is stricken off the record—and the Atlantic Coast District decided that they would oppose any sort of these suits that were brought.

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Q. Is it a fact, Mr. Ryan, that the union here in New York has always considered, and still considers, that the



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*Joseph B. Ryan—For Defendants—Cross.*

payment practices which the stevedores have followed are in compliance with the Fair Labor Standards Act?

Mr. Goldwater: I object.

The Court: Objection sustained.

Q. Would the method of payment prevailing in this port have been acceptable to the union?

Mr. Goldwater: I object.

The Court: Sustained.

551

Mr. Taylor: May I have an answer, as an offer of proof?

The Court: Yes.

A. Absolutely; yes.

Cross Examination by Mr. Goldwater:

Q. May we start with the last answer, Mr. Ryan. Is it your opinion that the payments are in compliance with the contract, even if that violates the Fair Labor Standards Act? A. I do not understand that question.

552 Q. All right, I will let your answer stand, that you do not understand. A. Wait a minute.

The Court: That is a perfectly satisfactory answer. If you do not understand the question it is up to counsel.

The Witness: I do not understand the question. I say that our contract does not violate the Fair Labor Standards Act, or we would not have signed it, if that is the way I am going to be hamstrung here. I do not mean you, Judge, but I say you explain the question to the other guys. I will understand the next one you ask me. I understood that one, but you were putting two in one.



*Joseph B. Ryan—For Defendants—Cross.*

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The Court: All right, put your next question.

Mr. Goldwater: I want to be sure Mr. Ryan is through with his comments, first. He must have plenty of opportunity for comment.

The Witness: Yes, but I do not get a chance to answer the question, so that is all right.

Q. You got a chance to answer that one. That was the first one I asked you. A. I asked you to explain it.

Q. I asked you one question, just one question.

The Court: We are getting no place at all. 554  
Now put your next question.

Q. Now, Mr. Ryan, you have said that the men—and I assume you were speaking generally of all men who are longshoremen working in the port of New York—objected to working nights? A. The majority.

Q. And has that been true for many years? A. Many years.

Q. It has been true as long as you have had anything to do with this industry, which goes back, according to your statement, to 1912? A. Yes.

Q. Has the question of working nights been raised each time a new contract was negotiated, since you have first had anything to do with the negotiations? A. What was your first word there? 555

Q. Has the question been raised, the question of working nights been raised each time a new contract was negotiated? A. Yes.

Q. Has the position of the union always been that it objected to the demands of the Shipping Association members that the men be required to work nights if the Shipping Association members wanted them to? A. We said we should be only required to work nights when it



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*Joseph B. Ryan—For Defendants—Cross.*

was absolutely necessary. We did not want to stifle our industry.

Q. That is, was the negotiating committee's position that it accepted the clauses in the contract, which, as I read them, have been there repeated and repeated and repeated, that the men would work nights when required?

A. Yes.

557

Q. Now you have said that the objective in the negotiation with respect to this overtime and night work business has always been that the men felt that they should be required only to work during the normal day hours; isn't that correct? A. As far as possible and still to meet the needs of the industry.

Q. It is not in the best interests of the industry, I mean from the shipowners' or the stevedores' standpoint, from an economical standpoint, to pay overtime, is it?

A. Of course not. If we make it expensive enough they will work only in the daytime. We feel they will adjust the industry as close as possible to daytime work.

Q. And the requirement then that has always existed is of a very substantial difference in compensation for work after 5 o'clock and work before 5 o'clock? A. That is right.

558

Q. That requirement was designed then to force the industry as far as possible to employ men in the daytime?

A. Absolutely.

Q. You put a premium on a penalty?

Mr. Taylor: You interrupted him.

Q. Did I interrupt you, Mr. Ryan? A. I was about to say that overtime, with that overtime we introduced a new innovation in our agreements. The employers say it cannot be done in the steamship industry, but when we make it expensive enough for them they come pretty near generally doing it.



*Joseph B. Ryan—For Defendants—Cross.*

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Q. Has there been innovation with respect to the difference between the night pay, pay after 5 o'clock at night, and the day pay for the last 20 years in the industry?

A. Ever since the National Adjustment Commission made it two rates, 65 cents and \$1, we have continued that sort of time and a half over the day rate. We make the day rate as high as we possibly can get it, and then make the night rate as high as possible.

Q. It has not always been \$1.50? A. No, it was 70 cents an hour at one time.

Q. I said \$1.50. I meant time and a half. It has not always been exactly time and a half? A. No, but pretty close to it.

560

Q. There was a time when the union was required to take a cut, would you say? A. That is right.

Q. That pressure existed and continued for two or three contracts, did it, or more? A. A year and a half.

Q. Only a year and a half? A. They had a clause in the agreement then. It was their way. They had a clause they could open it up on March 1st and adjust wages.

Q. In what year are you referring to? A. 1923; on April 1, 1923 we got 5 and 7 cents an hour award from the Goethals Committee. We were looking for 5 and 10.

561

Q. Prior to the 65 cents for daytime work the rate was 80 cents, was it not? A. Prior to the 65 cents and \$1.

Q. Yes. A. It was 50, 75 and \$1.

Q. I am afraid I will have to show you the contract, Mr. Ryan. I think you are mistaken. A. I know I am not. Prior to 1917?

Q. No. Oh, you are talking of the 65 cents in 1918, are you? A. No, sir; 1918—1917 we got 65 cents. You mentioned the 65 cents. I do not know what you are talking about.

Q. You talked about 65 cents and \$1. Now what years were you speaking of when you mentioned 65 cents and



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*Joseph B. Ryan—For Defendants—Cross.*

\$1? A. The year that it was granted, I believe it was in 1917. You say it was 1918? I believe it was 1917.

Q. It would appear from the schedules you have that August 1, 1917 to September 1, 1918 it was 50 cents and 75 cents. A. 50 cents, 75 cents and a dollar; that is right. In 1918 we got 65 cents and \$1.

Q. In 1918 it was 65 cents and \$1? A. Yes.

Q. After that, in 1919, 1920, effective as of December 1, 1919, it was 80 cents and \$1.20? A. That is right.

Q. And continued 1920, 1921 at 80 cents and \$1.20?

563 A. Yes.

Q. Exactly one and a half times? A. Yes.

Q. In 1921 and 1922 it went back to 65 cents, didn't it? A. Yes.

Q. And it continued 65 cents in 1922 and 1923? A. That is right.

Q. It went to 70 cents, beginning effective April 1, 1923, 70 cents; is that your recollection? A. Yes, April 1, 1923, it went to 70 cents and \$1.07.

Q. That is right. A. That is right; we did not get the time and a half there. We lost a half a cent.

564

Q. You got a little over, you got 2 cents more? A. We figured a nickel in the morning and a dime in the afternoon. If we were looking for double time we got a dime in the afternoon.

Q. And the reason for the objection on the part of the men, as you know it, to work the night work, has always been the same? A. It has improved greatly, or enhanced greatly in the last 20 years. In the old days the men who did not belong to the union were not able to gain the objectives, but we know now they found out that the working man can enjoy the different things. That is why we want Saturdays, Sundays and nights off. So it has been greatly improved in recent years, as to why they want to cut out night work.



*Joseph B. Ryan—For Defendants—Cross.*

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Q. I do not understand what you mean when you say the reason has been improved. A. Your men can have more time for relaxation. In the old times all they could do was to stand around the corner when they got through work.

Q. You mean they urge it more, the urgency is greater for day work now than it used to be? A. Because this country is a better place to live in. We are getting more of the so-called luxuries—until the Communists put us on the bum.

Q. There may be greater pressure, greater urgency, but did the same objectives apply? A. Absolutely, only more forcefully.

566

Q. And the purpose of the union in negotiating for the men has always been to make the night pay as high as possible; to discourage employing men at night? A. That is right.

Q. Now, Mr. Ryan, the amount of this night pay, as far back as you have told us, has always been approximately 150 per cent of the day pay? A. Yes.

Q. And that ratio had no relationship whatever to the adoption of the Fair Labor Standard Act, did it? A. I do not understand your question. You say that is the answer. I feel this way, that other organizations—we did not need the Fair Labor Standards Act. We were able to collective bargain, and by that bargaining made an eight-hour day and time and a half for overtime, which every other organization aspired to. Sometimes they get double time. Generally it is time and a half. We have that without the Fair Labor Act. The only place it helped us was if a fellow was fortunate enough to work eight hours a day, Monday, Tuesday, Wednesday, Thursday and Friday, that before the Fair Labor Act he had to work Saturday morning for four hours at the single rate of pay. After the Fair Labor Act came in, if a man

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*Joseph B. Ryan—For Defendants—Cross.*

could work those times—it is very seldom a man works five straight days of eight hours, but if we worked five days, Monday, Tuesday, Wednesday, Thursday, Friday, previous to last October, before the Fair Standards Act came in, Saturday morning, due to our 44-hour contract, we had to work four hours on Saturday at the straight pay that you got on Monday or Friday. When the Fair Standards Act came in, then on Saturday morning, if we worked one hour on Saturday morning or two hours or three hours or four, we got time and a half, provided we had the 40 hours in in the previous five days.

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Q. And you would be sure that if a previous witness in this case said that that was not—I withdraw the question. That is not important. A. I have got the answer waiting for you.

Q. I beg your pardon? A. I knew the question. I have got the answer waiting.

Q. We both know the answer, so it is not important. A. No, we think differently. You are a lawyer, and I am not.

Q. I think we think the same on that question. A. No, we don't. You think it is the 41st hour.

570

Q. Well now, let us take that up. What would the man working Saturday morning get paid if he worked five nights during the week for eight hours? A. Previous to last October he would get \$1.25. Now he gets \$2.25.

The Court: What happened last October?

The Witness: Last October the Davis Award went into effect, and they gave us the 40 hours.

Mr. Goldwater: That is not in this case.

The Witness: It is in here all right.

Mr. Goldwater: I ask that the answer be stricken out as not responsive.

The Witness: Might I say, Judge, if I may be



*Joseph B. Ryan—For Defendants—Cross.*

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allowed to say this: this is a very important case to our organization.

The Court: I have not any doubt about it.

The Witness: And there are people in court here who are leading the rank and file of the membership of our organization. They are waiting for me to break, and I won't. That is why I am making these remarks. It is no facetiousness, but the eyes of the world is on this thing. It is a very important case, and may knock down everything we have built up in 30 years.

Mr. Goldwater: I move to strike out the answer.

572

The Witness: Sure, it is in the minds of the people out here.

Q. That is all you care about. I am concerned only with answers to the questions. A. I will try and confine myself to them?

Q. I will appreciate that, Mr. Ryan. I know you can. Now will you answer my question if I make it a little more specific, so that it won't include any period beyond October last. I want to know, during the years 1943 and 1944, and prior to the Davis Award, if a man worked five nights, eight hours—and by "nights" I mean hours after 5 p. m. at night—and then worked Saturday morning—

573

Mr. Taylor: And no daytime hours?

The Court: Disregard that.

Mr. Taylor: I want to be clear.

The Court: The question is clear.

Q. —what would his rate of pay be, Mr. Ryan, for Saturday morning? A. It would be whatever the basic day pay rate was.

The Court: \$1.25!



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*Joseph B. Ryan—For Defendants—Cross.*

The Witness: Well, he said 1942 or 1943.

Q. No, I said 1943-1944. A. In 1943 we were getting \$1.25 and \$1.875; for the five nights he would get \$1.875. Under the contract for the four hours on Saturday morning he would get the rate specified in the agreement, \$1.25.

575

Q. But if the man worked only three nights, eight hours apiece, and Saturday morning, what would he get for the nights and what for Saturday morning? A. He would get \$1.875 for the three nights, the eight hours at night, or 24 hours, and \$1.25 for Saturday morning.

Q. And if the man worked prior to Saturday only, 10 hours each night for five nights—in other words 50 hours at night—and then Saturday morning, what would his rate of pay be? A. \$1.25.

Q. For Saturday morning? A. Saturday morning.

Q. And if he worked at night a total of 50 hours, 10 hours a night for five nights, would he be paid, Mr. Ryan, exactly the same rate of pay for each of the hours on the fifth night, on Friday night? A. Absolutely; he would get the rate called for, \$1.875.

576

Q. You understand, of course, Mr. Ryan, that in the cases I have just put to you I have assumed that the man worked no day hours prior to the night work? A. Yes.

Q. You understood that? A. Yes; you have pointed that out. I did not assume it.

Q. Mr. Taylor thought it was not clear, and I wanted to be sure you understood it. A. I am not paying him.

Q. Now, Mr. Ryan, you have said, in the very early part of your testimony, in answer to his Honor's question I think it was, that the only parties to the contract—and I speak now of the contract which was effective as of October 1, 1943— A. Yes!

Q. —were the New York Shipping Association and the union. Don't you want to correct that? A. When did I say that?



*Joseph B. Ryan—For Defendants—Cross.*

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The Court: Well, is that the fact? If you want to change it change it.

The Witness: The question, I believe, was were we the only longshore organization in the port. I said yes, that our agreement was with the New York Shipping Association. I said yes, but that there were certain companies who were not members of the New York Shipping Association that were bound by that agreement.

Q. Well, Mr. Ryan, apart from the certain companies who are not members of the New York Shipping Association, was not the Deep Water Steamship Lines a party to the agreement? A. Yes. 578

Q. And is that a group or an association designated? A. No, sir.

Q. Under that title? A. No, sir; we know them as members of the New York Shipping Association.

Q. They are separately designated as the Deep Water Steamship Lines in the contract, besides the designation as New York Shipping Association? A. I do not want to mention anything that is not in here. I do not want to embarrass any companies. There are some deep water lines that are still not members of the New York Shipping Association. 579

Q. Was it those lines you were referring to when you answered his Honor's question that there were others who were not members of the New York Shipping Association? A. Yes.

Q. How about the contract stevedores of the port of New York? A. They are members of the New York Shipping Association. They have representatives on the committee that negotiate the agreements with us, or discuss grievances, but they are all members of the New York Shipping Association. If there is an odd one that is not



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*Joseph B. Ryan—For Defendants—Cross.*

Q. I am inquiring as to whether they are a separate group or association? A. They are all members of the New York Shipping Association.

Q. They are, however, separately mentioned, apparently, in this agreement? A. So we make sure we get everybody and the companies do not get any of them.

Q. You were present at the negotiations, and I assume at the signing of the agreements for many years? A. Yes, I have been on every committee since 1915.

581

Q. And these agreements have for many years past spoken of a basic working week consisting of 44 hours; is that right? A. Yes.

Q. Now the agreement effective in 1941, in 1942 and the one effective October 1, 1943, were all negotiated and executed after the adoption of the Fair Labor Standards Act, were they not? A. I presume so. I do not recall the date.

The Court: October 24, 1938.

The Witness: Sure, yes.

582

Q. And you were aware of the provisions of the Fair Labor Standards Act when these agreements were negotiated and executed, were you not? A. To a certain extent I guess I was familiar with them.

Q. You knew what the maximum number of hours were for each of the three years? A. Yes.

Q. Will you explain, Mr. Ryan, why the contracts continued to speak of a basic working week of 44 hours, when you had knowledge of the existence of a statute which made a week of 40 hours under the Fair Labor Standards Act? A. For several years our proposition to the employers—before the Fair Labor Standards Act went into effect our proposition had been to the employer 40 hours a week, five days a week, and they always refused it and said it was not applicable to the steamship.



industry. The agreement that we signed, we knew that if it was in effect that there would not be a ship there for the full 40 hours a week, and we knew we were protected under the Fair Labor Standards Act, that if we worked more than 40 hours in your 40-hour week, that the 41st hour would be time and a half.

Q. Mr. Taylor asked you if you knew of the existence of the suit in Rhode Island? A. Yes.

Q. And you were prompted to answer that you did. Do you know whether that suit had for one of its objectives an attempt to recover for the men the overtime rate for Saturday morning work which had not been paid prior to the suit? A. Our organization was endeavoring to secure from the contractors the pay for the 44 hours on Saturdays that was over the 40 hours, and was not in accordance with the Fair Labor Standards Act. Our organization was trying—the contractor was not a regular contracting stevedore, which is irrelevant, of course. It was the hoisting people here, but the Navy was the fellow who had to pay the money. On a certain date they paid the money, and we had, I presume, a year or two back money coming, and we could not get that pay, and the organization was arguing it out with the Navy, and when the fellows that came from other towns into Providence and then went to work on this job, one or two of them were fired, and they started the suit.

We went down to Washington, and they immediately gave us the back money, and we backed out of the suit.

Q. But the overtime was not paid in the Providence area for Saturday morning work generally, was it? A. It was not paid there by orders of the United States Navy, or the government itself, until we proved that they were violating the Fair Labor Standards Act.

Q. And a suit was brought, and as a result of the suit double pay, or rather time and a half pay, was given for



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*Joseph B. Ryan—For Defendants—Cross.*

Saturday morning? A. I would say it was expedited. We had been getting it for some time before the suit was brought. It was the retroactive pay that the Navy was holding up.

Q. Were these employees all employed in the Navy yard, Mr. Ryan? A. They were employed in Davidsonville. I have not been there. It was a Naval Reservation, and they had the Fuller Construction Company doing the work with all the supervising stevedores. There was no contracting stevedore there. It was the Navy itself.

587

Q. You say you have never been at Davidsonville? A. No.

Q. You do not know what sort of work was being done there? A. Oh, yes, I do. Vice-president O'Malley reported to me what was going on. My information was that it was strictly a naval reservation. There was mostly naval work and mostly handling of ammunition.

588

Q. Were not longshoremen working on materials that were being shipped overseas? A. That is right, but there was no contracting stevedore doing the job. The Navy had some fellow to run it for them. He had a contracting business, but he did not bid on it. He just worked for the Navy and the Fuller Construction Company. But I might add to it, Mr. Goldwater, they were our membership and our representatives had access to the piers and the cooperation of the company.

Q. You mean men in your membership were involved in this situation? A. Yes.

Q. When you say that the employing stevedore was not a member of the association of the Atlantic Coast—A. Yes, John C. Orr was a contracting stevedore, but they could not get this contract. They hired him as a supervisor. The Fuller Construction Company had the contract. They had a better pull with the Navy than we did.



*Joseph B. Ryan—For Defendants—Re-direct.*

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*Joseph B. Ryan—For Defendants—Re-cross.*

Q. But the man who was hired was a member of the North Atlantic Coast Shipping group? A. In each port they have an employers group, but in the New England ports John C. Orr was the stevedore there. He would sign the agreements. It was negotiated in Boston.

Q. He was a member of that group that signs an agreement with your union? A. Yes.

Re-direct Examination by Mr. Taylor:

Q. Mr. Ryan, after the payment was made that you have told us about, up at Davidsonville, you know don't you, that the suit still continued and they are now trying to get time and a half on time and a half, just like down here, and that is what your Council voted that you were not in favor of? A. Yes, but our membership withdrew from the suit when we gained our objective to get the retroactive money, and left it to the two men that had been fired by John C. Orr.

590

Q. But what you are referring to as being opposed by the I. L. A. Council is the continuation of the Davidsonville suit, trying to get time and a half on time and a half? A. Absolutely.

591

Re-cross Examination by Mr. Goldwater:

Q. When Mr. Taylor says time and a half on time and a half, you know that he is referring to time and a half on the night rate, don't you? A. And the night rate is time and a half.

(Witness excused.)



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*John V. Lyon—For Defendants—Direct.*

JOHN V. LYON, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination by Mr. Taylor:

Q. Where do you live, Mr. Lyon? A. 111 East 88th Street, New York City.

Q. What is your business? A. I am chairman of the New York Shipping Association.

593

Q. How long have you been connected with the Shipping Association? A. Well, I am a member of the Conference Committee, beginning 1931, and I became a voluntary chairman in 1938, and I became the paid chairman in 1939.

Q. At the time of what we are calling here the Collective Bargaining Agreement, that is the one covering the years 1943 to 1945, were both of the defendants here members of the New York Shipping Association? A. The Haron and the Bay Ridge, yes.

594

Q. Do you know the number of members in the New York Shipping Association? A. At present we have about 140 or 145. There are about 52 steamship lines, about 68 contracting stevedores, and the rest are divided between watching agencies and contracting carpenters.

Mr. Goldwater: May we have those two first figures again?

The Witness: 52 for the steamship lines, 68 for the contracting stevedores, and the balance is split between contracting watching agencies, which I think is around 13, and contracting carpenters, which is about the same number.

Q. Has it been the practice for many years upon the execution of a collective bargaining agreement between the International Longshoremen's Association and the



*John V. Lyon—For Defendants—Direct.*

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negotiating committee of the New York Shipping Association, to make up copies of it and circularize the industry? A. Yes.

Mr. Goldwater: I object to that as immaterial and irrelevant.

The Court: It is not very crucial either way, but I will allow it.

Q. That is, the Shipping Association, or the committee of the Shipping Association, would sign the contract for the Association? A. The Conference Committee signs it practically immediately it is brought up, they and the representatives of the I. L. A., and then after that it is promulgated to the other members for signature.

596

The Court: Are they bound by it as a group, or do they have to acquiesce in it individually?

The Witness: I am not a lawyer.

The Court: You do not know the answer?

The Witness: No, sir.

Q. That is what I am getting at, whatever the legal answer may be the fact of the matter is that after the conference Committee has signed for the Association and Mr. Ryan, or whoever it is, has signed for the I. L. A., it is immediately then distributed by the New York Shipping Association and treated as in effect throughout the ports? A. Yes.

597

Q. Meanwhile you are sending it around and getting signatures from all the people who are members of your Association? A. Yes.

The Court: We will recess now until 2:15.

(Recess to 2:15 p. m.)



## AFTERNOON SESSION.

JOHN V. LYON resumed the stand.

Direct Examination Continued by Mr. Taylor:

Q. Mr. Lyon, is it true that there came a time when Mrs. Schleifer or Mrs. Schleifer and Commander Evans or someone else from the War Shipping Administration were in touch with you with respect to having some statistical studies made with respect to straight time and over time in the port of New York? A. That is right.

Q. Won't you please tell us about it?

The Court: Before you go into that, as I understand the stipulation the facts stated in the stipulation are deemed to be true. Now what more can you establish? Conceivably if the plaintiff were to offer evidence to show that although the facts are true they are not the whole truth in the sense that they are unduly selective or in some other way biased in a direction or contain some internal tendentiousness, then you might want to prove or offer proof that that is not so.

Mr. Taylor: I think the only reason I was thinking of going into it, your Honor, is that when I handed counsel for the plaintiffs copies of the statistical studies they also wanted to have copies of the instruction sheets which were sent to the companies and they have asked me various questions, and from the fact that they reserved all rights other than the right to object because of the hearsay rule or the best evidence rule I thought that they were intending to somehow or other attack the significance or relevancy of these things, the weight which your Honor will attach to them.



*John V. Lyon—For Defendants—Direct.*

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The Court: They may attack any aspect of it except the truth of the studies. I don't know what more you can do.

Mr. Taylor: I don't know that I can do a great deal more. I am of course concerned to put in everything I could put in so your Honor will be able to look at these things and accept them as of some significance.

The Court: I don't want you to call this witness back in the event the plaintiffs should challenge it. I will ask Mr. Goldwater if he has any such expectation.

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Mr. Goldwater: I undoubtedly have the expectation of challenging the weight of the evidence, of course.

The Court: By weight if you mean legal significance, there is nothing that this examination is going to help. If you mean the amount of credibility in that sense—

Mr. Goldwater: Oh, your Honor, no, I have no means of attacking credibility. Mr. Taylor has access to the records and produces the records. We say to him now, "Mr. Taylor, you have got to assume in accordance with the questions you ask you got truthful answers." I can't find that out unless I took two years to examine all of these things. And that is what we are trying to find out—the assumption that these are truthful answers and reflect the books accurately. That is as far as we want to go. You call it truthfulness; we call it accuracy in our stipulation. And we are trying to find out whether they would be accurate answers in respect to questions. Now certainly I am going to ask the witness the kind of question he was asked and the instructions that

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*John V. Lyon—For Defendants—Cross.*

were given. I did it this morning and that has nothing to do with—

The Court: Then I don't want to circumscribe Mr. Taylor if you are going to examine.

Mr. Taylor: May I make what I hope will be regarded as a practical suggestion? That I now turn Mr. Lyon over to Mr. Goldwater for examination and waive the Federal Rule that he cannot go into matters that I have not gone into and let him examine Mr. Lyon on the statistical studies.

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The Court:—Fair enough.

Cross Examination by Mr. Goldwater:

Q. Mr. Lyon, do you know anything about the facts or figures that appear on the statistical chart of your own knowledge? A. The only thing I know about them, that is, after consultation with Mrs. Schleifer and representatives of the War Shipping Administration we wanted to get certain statistical data, and we discussed the thing and arrived at a certain questionnaire that should be sent out to the lines, asked them to answer it. The replies were sent to me and I in turn sent them to the War Shipping Administration.

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Q. With respect to Defendants' Exhibit D, for example, the letter was sent to the companies that you had indicated by letters on the chart, of which this copy was handed me by Mr. Taylor. Are you familiar with that letter? A. I know that that letter was sent out; yes, sir.

Q. Was the discussion with respect to the statistical material which Mrs. Schleifer or Mr. Taylor wanted discussed with you prior to the preparation of the letter? A. It was.

Q. Did you make any suggestion to them as to what material should be asked for in this letter of inquiry or instructions? A. Well, I probably did. What we were trying to strive for, as I recall it, a couple of years ago—



*John V. Lyon—For Defendants—Cross.*

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Q. No. I asked you whether you made any suggestion, first. You say you probably did? A. I probably did.

Q. I would like to ask you if you recall the suggestion you made as to the material to be asked for? A. No, I do not.

Q. You don't recall that. Do you recall in this letter of instruction the following: "What number of such 319,313 overtime man-hours also involve man-hours worked during each of the following straight time periods: (a) From 8 to 6 straight time hours; (b) from less than 6 to 4 straight time hours; (c) from less than 4 to 2 straight time hours; (d) from less than 2 to no straight time hours; (e) no straight time hours"? A. Do I recall it?

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Q. Yes. A. Yes, I do.

Q. Do you recall any discussions with Mrs. Schleifer or anyone else representing the defendants with respect to the purpose of this information? A. Well, all I can say as far as the purpose goes is that we were trying to find out what the custom of the port was as to how men worked; if they worked in straight time did they work any overtime; if they worked any overtime how many straight time hours they worked.

Q. You recall nothing more specific than that with reference to this particular instruction? A. I think that was the general tenor of what was intended.

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Q. Do you recall any specific discussion with respect to the subdivision which pertained to the hours worked from 8 to 6 straight time hours, the subdivision (a), Mr. Lyon? A. Yes. They wanted to get—to break it down into whether the men worked a certain number of hours during straight time periods and if they also worked an overtime period.

Q. They wanted to know if the men worked any overtime period who had worked from 8 to 6 straight time hours? A. Yes.



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*John V. Lyon—For Defendants—Cross.*

Q. Do you recall any discussion as to whether or not they should ask in this letter of instructions for information as to men who worked overtime who had worked 8 hours, specifically 8 hours? A. Not specifically, no, sir. I do not recall any discussion asking as to whether men worked 8 hours specifically.

Q. You mean there was no consideration so far as you know of the question, "Should we ask for overtime hours of men who worked 8 hours"? A. I don't recall that there was.

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Q. You don't recall that? A. No.

Q. You have no personal knowledge with respect to the substance of this Defendants' Exhibit D which came as a result of this letter of instruction? A. That particular exhibit?

Q. Yes. A. No. The only thing that I know, Mr. Goldwater is that I did confer with Mr. Nolan in arriving at what represented we thought representative trades, representative businesses that were done by various companies so as to arrive at what was about 70 per cent of the business of the port.

612

Q. In selecting the 70 per cent group, did you consider specific names? A. Of companies?

Q. Yes. A. Yes.

Q. Are the names which appear on this chart the only group which would have made approximately 70 per cent of the business done in the port? I am talking of business in the sense of hours worked by stevedoring companies. A. I presume that you could extract one company and put another company in its place.

Q. Who determined which named companies should make up the 70 per cent? A. Well, I thought that I was fairly competent to judge who was doing the business in this port that would make up 70 per cent of the business done. I had been in the steamship business since 1913. We have



*John V. Lyon—For Defendants—Cross.*

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got a list of the contracting stevedores in this port. We have got probably 95 per cent of the steamship lines in this port. And I don't know—I am not saying this boastfully; I don't know any better source I could go to to get the information that they wanted.

Q. I am sure that you have background and information sufficient to tell them the names of a number of companies which would make 70 per cent, I haven't the slightest doubt of that; and I haven't the slightest doubt also that you know the names of all the rest of the companies that make up the 30 per cent. The source of their inquiry is not challenged. A. Mr. Goldwater, I would like to say also that in making up this list we also try to get a balance between passenger lines, freight lines, the trades that they are in—I mean some Europe trades, Far East trades, all that sort of thing, so that we would strike a fair balance.

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Q. How many of these companies were passenger line companies? A. Oh, I don't know. I could tell if I had the list now. If it was put before me I could very easily tell you who were passenger lines and who are freight lines.

Q. Well, I will take the list of 17 companies on Defendants' Exhibit E, and we have been given this list by Mr. Taylor. A. H. Bull & Company. A. Freight.

615

Q. Freight? Exclusively freight? A. When I say freight I am saying freight and no passengers. Freight.

Q. Tell us what you mean by that. A. The Bull Line is exclusively a freight line, does not carry passengers.

Q. Is that the name of a company, a stevedoring company or shipping company? A. No, Steamship line. They do their own work.

Q. They do their own work. That is what I am coming to. Now, the Associated Operating Company. A. Associated Operating Company is mostly freight, and a



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*John V. Lyon—For Defendants—Cross.*

few passenger ships carrying a very limited passenger capacity.

Q. Is that a stevedoring company? A. That is a stevedoring company which is an affiliate or subsidiary of Funch, Edie & Company.

Q. What is Funch, Edie & Company? A. Funch, Edie & Company are general agents for a large number of steamship lines.

Q. I would assume then that the large number of steamship lines are primarily in the cargo business, freight business? A. Except for what I told you, it is a small line that runs down to the Dutch West Indies. It has frequent sailings but does not carry a large number of passengers.

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Q. Now, the Atlantic Stevedoring Company? A. Barber Steamship Line; entirely freight.

Q. And the Cunard White Star? A. Freight and passenger.

Q. And what would be your answer as to percentage, if you can give it to me, of freight and passenger service? A. Of the Cunard Line?

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Q. Yes. With respect to the tonnage or with respect to stevedoring work on freight boats against passengers. A. Well, the Cunard Line is considered a passenger carrying line, but it also carries a large amount of freight; and they also have vessels that are entirely freighters. But the number of men involved, Mr. Goldwater, in handling passengers is usually relatively small; the number of men that are used, the volume, in the handling of freight; the passengers are quickly discharged and fairly quickly loaded.

The Court: And they usually come off under their own motive power.

The Witness: Except their hold baggage; and



the stewards bring on their hand baggage, as you know.

Q. Jarka Corporation. A. Jarka Corporation? Well, you know Mr. Nolan was on the stand; he has freight lines, and he did have in that period the Holland-American Line and he had the North German Lloyd, Hamburg-American—I suppose we shouldn't talk about that.

Q. Why not? A. —And German Lines. Those are the only two passenger lines that I can think of immediately that they had.

Q. We are talking of the exhibit now, Mr. Lyon, that deals with the analysis of work hours of longshoremen in the port of New York covering the payroll period nearest November 1, 1938 to payroll period nearest August 31, 1939. A. Yes.

Q. And John W. McGrath Corporation? A. Freight.

Q. Exclusively? A. At that time I think so.

Q. Northern Dock Company? A. Northern Dock Company is freight. That is the Kerr Line.

Q. Pittston Stevedoring Corporation? A. Freight.

Q. Union Stevedoring Corporation? A. Freight and passenger. That is the American Export Line.

Q. What would you say as to the division of work of longshoremen between passenger service and freight service? A. The same thing applies to all passenger lines. The number of hours spent on passengers is relatively small compared with that spent on handling freight.

Q. Is that a case in which there were some ships exclusively freight as there were in the other companies that you mentioned? A. American Export?

Q. I am talking of the Union Stevedoring Company. A. I am sorry.

Q. Wasn't that the last one I mentioned? A. Yes. I supplied the information that the Union Stevedoring



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*John V. Lyon—For Defendants—Cross.*

does most of their work for the American Export Line. American Export Line has some freighters but most of their vessels are combination freight and passenger.

Q. Could you give us any idea with respect to tonnage of the proportion of exclusively freight and freight and passenger?

The Court: Tonnage of the ships.

Mr. Taylor: Ships, yes.

A. How can you determine?

623

Q. You may not be able to answer my question. My question may be foolish. A. It is repetitious. The work done in handling passengers and their baggage is not great.

Q. I understand, but there has been testimony that there is a difference with respect to the pressure on getting solely cargo ships out as against getting freight and passenger ships out. Therefore I would like to know—

Mr. Taylor: That is not a correct analysis of the testimony, if I may interrupt to say so.

Mr. Goldwater: You may interrupt to say so. I haven't any objection.

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Mr. Taylor: The difference between the freight and the freight and passenger with respect to the amount of freight—

Mr. Goldwater: I am not asking with respect to the amount of freight.

The Court: I can't hear both of you gentlemen at the same time.

Mr. Goldwater: Would you repeat the question?

Q. (Read.) A. You would like to know what?

Q. Whether you can tell me the ratio or percentage of the total which the cargo ships bear to the total with respect to the tonnage. A. The volume in this port?



Q. Yes. A. No.

Q. You can't tell me what? A. No.

Q. All right. I am talking about, only as to this company, you understand? A. Oh, as to that company?

Q. Yes, as to that company of course. A. Let's say probably 80 per cent of their ships are combination freight and passenger. Is that what you want?

Q. Yes, that is what I wanted to know. Now the Universal Terminal & Stevedoring Company. A. Freight.

Q. When you say freight am I to assume exclusively freight? A. Yes, as I can remember.

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Q. Huron Stevedoring Corporation? A. Huron is freight and passenger—that is, when I say freight and passenger I mean combination freight and passenger steamers with a small percentage of purely freight steamers.

Q. Do you know that on this exhibit, Defendants' Exhibit E, there is a note that—I withdraw the question.

What about New York and Porto Rico Steamship Company? A. New York and Porto Rico Steamship Company do their own work or did their own work at that time. They have both freighters and combination freight and passenger ships.

Q. And can you tell us the proportion of each? A. No, I cannot, but I would say that it inclines more toward the combination freight and passenger than it does toward purely freight.

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Q. Moore-McCormick Lines. A. Both freight and passenger.

Q. The combination? A. They have both freight ships and passenger ships. When I say combination freight and passenger ships and purely passenger ships—

Q. And there can you tell me the percentage of each or the ratio? A. I couldn't give you the ratio, I think the percentage of passenger ships outweighs the freight ships.

Q. John T. Clark & Sons? A. Well, there again we



have a company that is comparable to Jarka Corporation. That is a large company and it has business all over the port. They did mostly freight ships and then they did some combination freight and passenger ships.

Q. Now Bay Ridge Operating Company? A. Bay Ridge Operating Company has both freight and passenger ships. I would say that the emphasis is on the passenger ships—wait a minute now. Let me correct that, please. Bay Ridge Operating Company have purely freighters, they have combination freight and passenger ships to carry—those combination freight and passenger ships carry large amounts of freight and then they have purely—not purely passenger ships—well, take the Monarch of Bermuda and the Queen of Bermuda which carry around 600 passengers and carry a small amount of freight and mail and express cargo.

Q. You are aware, are you not, that in the case of Bay Ridge Operating Company the information furnished on this exhibit is for the months only of July and August 1939? A. Well, if you say it is there it must be there.

Q. A footnote says that on this exhibit. A. Well, if it is there, if that is what it says—

Q. Didn't you know that before, Mr. Lyon? A. I think that I did know it, Mr. Goldwater. It is not easy to assemble records, Mr. Goldwater.

Q. I think you have done very well. A. I mean some have and some didn't.

Q. In connection with the Bay Ridge Operating you are familiar with the lines for which they do the stevedoring work? A. Well, I know that they do practically—well, they do all the work of Furness-Withy Line. They do the Swedish American Line. Is that what you mean?

Q. Yes. Do you know whether there is a difference between the volume of stevedoring work which they do in the summer months as against the spring, fall or winter months? A. Well, that would be a pretty difficult prob-



lem—very difficult thing for anybody to answer because the Bay Ridge Operating Company are doing business for Furness-Withy and they have a great deal of business in one part of the world and very little business from another part of the world; so it would not all come in a large volume at one time. It varies.

Q. Well, I understand you can't be specific as to percentages. I am asking you whether you know generally whether any season of the year is disproportionate to any other season of the year in their stevedoring work? A. It depends on what trade it is in.

The Court: In other words, is July and August a typical part of the year?

Mr. Goldwater: That is right.

The Witness: I would say for a certain part of the Furness-Withy business it would be very great. Other branches of their business may be very small. I wouldn't know that.

Q. Would you know what the result of that would be with respect to its total annual business? A. There again I don't think that the months of July and August would vary an awful lot from the rest of the year.

Q. That is what I want to know.

Q. You have no reason to believe that it is abnormal?

The Witness: No, I do not.

Q. What about Marra Brothers? A. Freight.

Q. And Turner & Blanchard? A. Freight with the exception as far as I can recall of one passenger line. That is the Norwegian American Line.

Q. Now in attempting to assemble this information did you learn or did you give consideration to the total approximate amount or relationship of the tonnage handled



on ships which had combination freight and passenger as against the total handled or the man-hours relationship between the two things? A. No. What we tried to do is get a cross-section of the port.

Q. And who determined what would be what you call a cross-section of the port? A. Well, I told you before, without appearing to brag, I thought I was just as well qualified to do that as anybody else, and I conferred with Mr. Nolan who is on our committee and is also the chairman of the stevedoring committee of the Maritime Exchange, and I think the combination of his knowledge and my knowledge—I think we could arrive at something that is fairly accurate.

Q. Did you have any figures before you as to man-hours worked and overtime work when you made your selection of those companies which would make approximately 70 per cent of all handled? A. No, sir.

Q. You did not? A. We did not.

Q. Did you have any information as to which of all the companies—which included the 70 per cent of the port costs which appear on the chart—approximate 70 per cent—worked more or less overtime? A. We didn't know what we were going to get when we asked these questions.

Q. Well now, you have pretty substantial familiarity with the practices of the companies in the port of New York, haven't you, with respect to this work? A. I know from my own particular experience that ships, combination freight and passenger ships, work more overtime than freight ships, and the amount of time spent on combination freight and passenger ships depends entirely upon the setup of the schedule of the lines.

Mr. Goldwater: Now if your Honor please, I think at this time in order to aid me in further cross-examination of the witness that we should



*John V. Lyon—For Defendants—Cross.*

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call upon the defendants' attorneys to identify the companies on this exhibit against the list of names which we have. The only two companies which have been identified are the two defendant companies.

The Court: And a few others.

Mr. Goldwater: No.

The Court: Which were identified in the course of cross-examination on Jarka.

Mr. Goldwater: The Jarka Company got identified by virtue of the fact that a statement was made that it was the largest and we naturally look to it for the largest number of man-hours. 638

The Court: My records show that Atlantic and Jarka were identified.

Mr. Goldwater: Atlantic was too. I beg your Honor's pardon.

The Court: And Jarka. I think the symbol for Atlantic was CA on one exhibit and A1 on the other. I don't know.

Mr. Taylor: Mr. Nolan has told me that it is EA for Jarka.

Mr. Goldwater: I assumed that it was.

Mr. Taylor: And KA is Huron and OA is Bay Ridge. 639

With respect to tying the name into the codes all I can say to your Honor is this: This information was obtained through Mr. Lyon's organization at the request of the War Shipping Administration. As I understand it at the time there was some reluctance on the part of the people consulted to furnish this sort of detailed information without knowing where it was going, and consequently it was treated as confidential.

The Court: I will not compel its production. It may have a bearing on the weight or inferences I



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*John V. Lyon—For Defendants—Cross.*

shall draw but I will not compel its production.

Mr. Goldwater: In view of the testimony that has been given that there was a great deal more overtime work and there would be more overtime, naturally, for the reasons the witnesses have stated with respect to passenger service and with respect to purely cargo and freight service, it is impossible for us to comment in any way upon the testimony now.

The Court: I don't see that.

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Mr. Goldwater: And to show to what extent that testimony is accurate and to what extent it is not. We have pure generalities here. You have certain charts from which—

The Court: But accuracy is no longer open to you to challenge.

Mr. Goldwater: Perhaps not in so far as accuracy with respect to these figures are concerned, but accuracy with respect to the conclusions of the witnesses and its effect upon this overtime practice, which is extremely important—

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The Court: Well, now, let's get down to some practical limitations upon what use we can make of these exhibits. These other companies are not on trial. The only two companies that are on trial are the Bay Ridge and Huron. Now, with respect to those there are figures which have been identified.

Mr. Goldwater: That is right.

The Court: As far as the rest of it is concerned the only column that I will look at is the grand total in the sense that it gives a composite picture of the dominant portion of an industry and there, too, it has only limited significance. It has significance only in the sense that it is background material for the dominant conditions of an industry to the extent that they may have a bearing upon



the issues of this case which are somewhat dubious to me at this moment.

Now whether or not company letter X is a particular company or another, and if so whether the facts relating thereto fit into the generalizations given by the witness or not, that would involve the trial of so many extraneous issues that I think I would exclude it as a matter of trial administration.

Mr. Goldwater: But, your Honor, it seems to us that whether or not the total of the companies which handle exclusively passengers and those in another category which handle both passenger and freight, and those which handle exclusively freight, whether the total hours worked by them overtime would bear out the testimony of the witnesses is not extraneous in view of the testimony your Honor has admitted.

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The Court: You mean as to whether or not it is true that combination freight and passenger people tend to devote more of their time to overtime than straight freight carriers?

Mr. Goldwater: Yes.

The Court: Maybe that is true, but frankly I am not persuaded that that is a very important issue in this case. As a matter of fact, I am not at this moment persuaded that any of this is relevant. What I think is relevant is the employment arrangements between Addison and Huron and what his experience and history has been. And the issue has to be focused down to plaintiff and defendant. The rest is instruction. It may have sociological bearing. It may even have some economic bearing. But I am not convinced that it has legal bearing. I have let it in on the general theory that it is a good idea for the Court to be informed. That is

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*John V. Lyon—For Defendants—Cross.*

the way courts get wise by listening to all this inadmissible evidence. If you will show me an issue which is really germane and which would warrant the delay, I would do one of two things. I would either exclude the stipulation and sustain your objection or compel the disclosure.

Mr. Goldwater: I say now, your Honor, that so far as this exhibit is concerned—

The Court: Meaning E?

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Mr. Goldwater: —meaning E, and the same argument would pertain to D—so far as these exhibits are concerned we have testimony now of this witness and of other witnesses that a great deal more overtime was worked with respect to passenger freight combination or passenger ships than with respect to cargo ships alone.

The Court: All right.

Mr. Goldwater: Now, I say that we have a right to know—

The Court: Let me ask you first: Supposing it is true, what difference does it make? And (b) supposing it is false, what difference does it make?

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Mr. Goldwater: Then I say if it makes no difference you should exclude the exhibits definitely.

The Court: I have, in a sense, reserved your right to make that motion or to move to strike out because it was received under the stipulation in which you reserved admissibility.

Mr. Goldwater: That is right, and your Honor now has made certain reservations although we have indicated that it has no very important bearing upon the issues—you have still made reservations under which I must press for the right to this information. If your Honor were to say to me, "I will exclude it," then, of course, I am not interested in the information. But as long as it is ad-



*John V. Lyon—For Defendants—Cross.*

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mitted in evidence it seems to me I should have the right to the information.

The Court: Well, I shall rule at this time that I will not compel the disclosure of the names unless counsel for the companies from whom they were obtained are willing to disclose them. However, they thereby run the risk that if I should at the conclusion of the trial find that the line of examination that you want to pursue is germane then I may exclude the exhibit.

Mr. Taylor: Your Honor knows, of course, that they have all the names already.

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The Court: Yes, but they have not got them identified.

Mr. Taylor: They haven't got them identified.

The Court: They know who they are in the aggregate but they don't know which is which. At this moment, frankly, I don't see how it makes any difference. Frankly, at this moment, I don't see what legal bearing it would have upon the issues of this case, whether it is true as claimed by the witness or by some witnesses that passenger vessels or combination freight and passenger vessels tend to have a history of more overtime than straight freighters have. Maybe it has a bearing. I don't see it at this moment. If anybody wants to argue that it has I will be glad to listen to him at the proper time, but, not being persuaded that there is any great bearing, I don't want to direct that this information which has been obtained under a promise of confidence be disclosed at this time, notifying you all that if it should become germane you will have the opportunity to move to exclude it from evidence or—

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Mr. Goldwater: Your Honor understands we



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*John V. Lyon—For Defendants—Cross.*

haven't limited our objection to these exhibits alone?

The Court: I understand that.

Mr. Goldwater: I have no further questions.

The Court: I just want you to have this one thought. You will recall, Mr. Goldwater, that when I did receive this, I think I made some comment that in effect this was a table which I would perhaps have recourse to if it were published in the statistical analysis of the United States Department of Commerce.

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Mr. Goldwater: Which would be quite different, your Honor.

The Court: The only difference is that, being an unpublished statement by an unauthentic organization, your stipulation of accuracy lends it a certain degree of credence which otherwise, of course, it would not have, and it would, of course, be inadmissible on any other basis. You have, therefore, stamped it with authorship of an important character. I still have doubts as to its admissibility.

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Mr. Goldwater: Your Honor will understand that, of course, stamping it with authorship means that the witnesses—and I do not withdraw the accuracy stipulation—if we examine these witnesses for two years with respect to this examination—

The Court: You will get these answers.

Mr. Goldwater: That we would get these answers.

The Court: That is right.

Mr. Goldwater: What I have foregone in that is the right to challenge the accuracy only, the correctness with which the books are kept or whatnot. But that certainly does not in any way affect the issue—that is now—



*John V. Lyon—For Defendants—Re-direct.*

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The Court: It may be that I shall have to receive them for a very limited purpose, as it would be received for, anyway, as I think I indicated at the time of reception. But at this time I am not prepared to direct—

Mr. Goldwater: It seems to me that there is a vast difference between our stamp of approval which is designed to show that the witnesses would give these answers and the value of the information which is obtained.

The Court: That is true.

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Mr. Goldwater: And the value of the information which you might obtain from a Government report. That is quite a different matter.

Mr. Taylor: Yes, but the precise question, of course, is whether your Honor's ability to evaluate it is affected one way or another by whether Mr. Goldwater knows what name goes with what code number.

The Court: That is the crucial question which I am not disposing of now.

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Re-direct Examination by Mr. Taylor:

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Q. Mr. Lyon, I have shown you a letter which has at the bottom of it a notation to the effect that a carbon copy of it was sent to you. Does seeing that letter refresh your recollection at all as to the reasons why the figures received from the Bay Ridge Operating Company are limited to the two months of July and August, 1939?

A. Yes, it does.

Q. What is the reason? A. They could not locate the records.

The Court: That is what you were told?

The Witness: That is in the letter.

Mr. Taylor: It goes a little further than that.



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*John V. Lyon—For Defendants—Re-direct.*

The Court: He still hasn't got any information except that somebody told him so.

Mr. Taylor: That is right.

The Court: If there be an objection, of course, I will sustain it.

Mr. Goldwater: Of course, I object.

The Court: The objection is sustained.

Mr. Taylor: Would you like to read the letter, or are you willing to accept the statement?

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Mr. Goldwater: I am not willing to accept anything except information which a witness has of his own knowledge.

Q. Is this a copy of the letter, or did you receive a copy of this paper which I am now showing you? A. I think I did.

Mr. Taylor: I offer it.

Mr. Goldwater: I object.

The Court: Objection sustained.

Mr. Taylor: May I have it marked for identification.

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(Marked Defendants' Exhibit I for identification.)

Mr. Taylor: That is all.

Mr. Goldwater: No further questions.

The Court: You are excused.

(Witness excused.)

Mr. Goldwater: Your Honor will recall that when Plaintiffs' Exhibit 7 was introduced we stated at the time that there were certain confirmations required—

The Court: Certain what?

Mr. Goldwater: A certain confirmation of a further statement which Mr. Taylor wished time to



*Colloquy.*

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check up. He has now had time and says that we are liberty now, subject to an objection which he will make, to read as part of Plaintiffs' Exhibit 7 an additional paragraph in that stipulation which would read as follows:

"7. Wherever it appears in the attached pages that a plaintiff worked 11 hours on a Sunday those hours were worked between 7 p. m. Sunday and 8 a. m. Monday; wherever it appears that a plaintiff worked 11 hours on a Saturday those hours were worked between 7 p. m. Saturday and 8 a. m. Sunday; wherever it appears that a plaintiff worked 11 hours on any holiday those hours were worked between 7 p. m. on the particular holiday and 8 a. m. the following day", subject to a single instance which Mr. Taylor would like to mention.

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Mr. Taylor: It appears I think that the exception is limited to the plaintiff Tony Fleetwood who on August 15, 1943, worked from 8 a. m. to 12 noon and from 1 p. m. to 8 p. m., making up the 11 hours in that particular day.

The Court: Are you perfectly willing to add that?

Mr. Goldwater: Why yes, of course. Mr. Taylor has said that is the fact, and of course if it is we accept his statement that that is so.

663

The Court: I suppose that you type out that addition and actually physically annex it to the exhibit or else I might lose it.

Mr. Goldwater: All right.

Mr. Taylor: Your Honor will have in mind I am sure that the exhibit which we have now enlarged is the one relating to the employment and payment provisions of the Huron Stevedoring Company but is limited to the 10 selected—



*Colloquy.*

The Court: I understand that. Only to the specified plaintiffs now on trial in this severed lawsuit.

Mr. Goldwater: That is correct.

Mr. Taylor: That is correct.

The Court: I would assume that no such generalization could be universally made.

Mr. Goldwater: I don't think that your Honor can assume that it would or would not.

The Court: I say, I make no assumption.

Mr. Goldwater: Making no assumption, your Honor, is quite different than assuming that no generalization—

The Court: I meant that I could make no assumption that such a generalization would apply universally. Besides, I am not trying any other cases except these ten.

Mr. Goldwater: We will prepare in accordance with your Honor's suggestion—you said we should prepare that physically with the exception in it and then attach it to the exhibit.

Mr. Taylor: There is one other small matter before I call the next witness.

Mr. Goldwater wanted to know whether the testimony of Mr. Iglehart turned out to be correct. We find that in that particular it was incorrect. The correct statement is that Huron paid men at the rate of \$1.25 an hour for work on a Saturday morning if preceded by night work and no day work.

The Court: Conforming to the testimony given by the other witnesses.

Mr. Taylor: That is right. They paid the overtime rate for work on Saturday morning only when preceded by 40 straight time hours in the same week.



*Donald R. Horn—For Defendants—Direct.*

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Mr. Goldwater: By straight time hours you mean day work?

The Court: That is right.

Mr. Taylor: That is right.

DONALD R. HORN, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination by Mr. Taylor:

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Q. Mr. Horn, where do you live? A. 208 North Trenton, Arlington, Virginia.

Q. What do you do? A. I am a labor economist with the Maritime Commission, Labor Research Section.

Q. What has been your training and experience in that field? A. My training has been—

Q. Include in your answer if you will, please, also your education. A. Economics, major, at Northwestern University, and labor economic research work University of Chicago; and three years of government labor-economic research work.

669

Q. Where specifically are you now employed? A. With the Labor Research Section, Maritime Commission.

Q. Who is Dr. Reed who is sitting here with you in the courtroom? A. Dr. Reed is the chief of the Labor Research Section and I am his assistant.

Q. You and Dr. Reed and Mrs. Schleifer and I had some meetings, did we not, with reference to whether it would be possible to prepare and present to the Court statistical studies with respect to straight time work and overtime work of longshoremen in the Port of New York covering the period of the war years, did we not? A. Yes.



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*Donald R. Horn—For Defendants—Direct.*

Q. What sources of information were available to you for the purpose of making such a study?

Mr. Goldwater: If your Honor please, I would like to make my objection now perhaps to what appears to be the whole line of examination developing, although I can wait until it further develops.

The Court: I don't know where this is leading to. If you want to do it now, go ahead. Maybe you are anticipating. What, I don't know.

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Mr. Goldwater: Well, obviously this witness is being questioned about the sources of information which led to the preparation of the exhibits in evidence.

The Court: Already in evidence?

Mr. Goldwater: Studies.

Mr. Taylor: No.

Mr. Goldwater: No?

Mr. Taylor: Not at all.

Mr. Goldwater: Then I am sorry, sir. I am anticipating.

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Mr. Taylor: I suppose I am not making it clear. I have here in my hand another statistical chart of which a copy has been supplied to Mr. Goldwater which is entitled "Statistical analysis of work hours of longshoremen in the port of New York for two-week periods in the second, third and fourth quarters of 1944 and the first quarter of 1945." And to it there is attached a stipulation signed by both parties to the effect that the plaintiffs would not object to the table on the basis of the best evidence rule or the rule against hearsay evidence.

The Court: In other words, they will not object on the ground of competence?

Mr. Goldwater: Yes, of course.



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The Court: You will object only on the ground of relevance and materiality?

Mr. Goldwater: That is right.

Mr. Taylor: And I think that with respect to this one, unlike the others, they have not conceded the accuracy of the figures.

Mr. Goldwater: That is right.

The Court: You want testimony on that.

Mr. Goldwater: Yes.

Mr. Taylor: Yes.

Mr. Goldwater: If it is admissible as relevant and material at all then I certainly want testimony on accuracy.

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The Court: All right.

Mr. Taylor: We wanted it because of the fact that they are studies—one of them was an historical study from 1923 to 1927, another one for the first ten months after F. L. S. A. up to the instance of the war; and we knew that a lot of attention would be taken in the trial, as it has been, to conditions in the port during wartime, so we wanted to get and present to your Honor as complete a picture as we can. And of course the percentages of work here, as you already know they would be inevitably, are much higher than they were in the other chart. Argumentatively they are not in our favor, but we are giving it to you because we want you to have the whole story.

675

Mr. Goldwater: I still would preserve my right to object, in spite of the grand concession which Mr. Taylor has made. Because I must be consistent, your Honor. We objected to the tables that were introduced before.

Mr. Taylor: It is clear as to what I am trying to get at.



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*Donald R. Horn—For Defendants—Direct.*

Q. Mr. Horn, what material did you and Dr. Reed have available to you for the purpose of trying to compile the information on this page? A. We had invoices which the War Shipping Administration received from all the stevedores on Warshipsteve contracts. They were the basic source of information that we compiled into that table.

By the Court:

677

Q. And these were copies of invoices submitted by whom to whom? A. They were invoices of the stevedores, invoices to War Shipping Administration.

Q. For services rendered? A. For services rendered and for fiscal control.

Q. In other words that was the basis upon which the stevedores got paid by the War Shipping Administration? A. That is right.

Q. Now, War Shipping Administration handled what per cent, if you know, of the vessels in this port? A. Under Warshipsteve contracts War Shipping Administration in the port of New York handled up to 70 per cent.

678

Q. "Up to" is a very long range. A. Well, say approximately then; the other per cent is going into Army and Navy and a small amount of foreign account stevedores.

Q. What I meant was "up to 70" means from 0 to 70. That would not leave me any basis for inference. A. I meant approximately.

Q. Approximately how much? A. Approximately 70 per cent.

The Court: Approximately 70 per cent. All right, go ahead.

By Mr. Taylor:

Q. Did we have some discussion as to the extent of your investigation, that is, whether it should cover a certain



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calendar period or certain selected periods within what might roughly be called the war years?

Mr. Goldwater: I object to that on the ground that the conversations which they had or discussions which they had are not material.

The Court: It is quite immaterial.

Q. Tell us in your own way what periods are covered in this study and on what basis or principle they were selected. A. The period selected for the study was the last full year of war experience before V-E Day, and that also was a period of high man-hours worked in stevedoring.

680

Q. Did we decide that we wanted to have a period—

The Court: Never mind what "we decided". What did they do?

Mr. Taylor: All right.

Q. Did you select a period which had in it the highest volume of cargo movements in the port?

Mr. Goldwater: Now I must object, if your Honor please, to this question that is as indicative of the answer as this. It is far from leading. It goes way beyond.

681

The Court: Yes. I dare say it is leading. Tell us on what basis you made the selection.

This man is a trained citizen.

Mr. Goldwater: I think he should know.

Mr. Taylor: I will get it sooner or later.

Mr. Goldwater: I know you will.

The Court: He has been qualified to a certain degree of expertness. He is labelled a professional economist. He ought to be able to tell us, without



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counsel leading him, just what prompted him to make the selection that he did.

In other words, what you are being asked is to justify your sample.

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The Witness: All right. First of all the decision as to why to select a particular sample period. The particular sample period I selected here was the last full year of war experience because during that time the most cargo was loaded and presumably when most cargo was loaded that means the highest number of man-hours worked in stevedoring. And the records we have available are man-hours as such indicate also that the fourth quarter of 1944 was the peak of man-hours, stevedoring man-hours worked in the port of New York, and that then was included in the sample. And we took a full year rather than one quarter so as to eliminate any questions on seasonal variations. So we have the second, third and fourth quarters of 1944 and the first quarter of 1945 which gives us the last full year before V-E Day of stevedoring operations in the port of New York, and it includes the period or the quarter with the peak man-hours worked in stevedoring in the port of New York.

684

The Court: All right. Put your next question.

Q. What portion of that year did you compile figures for? The whole year or some portion of it? A. The total number of man-hours worked was such a tremendous job we decided to take a sample of them. And, normally a 5 per cent sample when items run into millions is considered adequate. But we took over 20, in fact a 23 per cent sample by taking—percentage sample of all man-hours—by taking all the man-hours worked in the middle two weeks of each of the four quarters. So our sampling then is from the 9th to the 22nd of each of the middle months of the four quarters.



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The Court: So, in other words, you have records for eight weeks?

The Witness: Eight weeks.

Q. What were the total number of man-hours in that year, approximately? A. Approximately 19 million.

Q. And the total number of man-hours covered by your study here? A. A little more than 4,300,000.

Q. Are you prepared as a statistician and an economist to say whether that would be regarded among men in that profession as an adequate sample; would statisticians so regard it? A. Yes. In the Department of Labor they use 5 per cent samples normally.

686

By the Court:

Q. You realize that your sample here is manifestly loaded in one direction or another. I don't know which way. But you have 8 weeks out of 52 which is less than 23 per cent and we have 23 per cent of man-hours. So your table must for some reason be loaded in one direction.

Mr. Taylor: What is the answer to that, Mr. Horn? Did you get the observation? Did you understand the criticism? 687

A. Well, about 8—about 16 per cent of the total time is the idea, and that came out to be 23 per cent of the total man-hours?

Mr. Taylor: Yes.

Q. I get it closer; to about 15 per cent of the time; isn't it? 8 into 52—

The Court: 52 into 8 is the way he figures.



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The Witness: What is the question?

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Q. You realize that your sample did not work out, it must be loaded in one direction or another, because it shows that for about 15 per cent of the time you got 23 per cent of the man-hours, isn't that so? If you had a carload of cans of tomatoes and you took out 10 per cent of the cans and you had 20 per cent of the weight, you wouldn't regard that as a sample of the cargo of tomatoes, is that right, assuming that all the cans were supposed to be uniform in size A. (No answer.)

By Mr. Taylor:

Q. Let me see if I get this. You have got 8 weeks selected out of a period of a year? A. That is right.

Q. Have I confused this thing by putting the wrong label on any of these figures? What is the 19 million man-hours? What are they? A. The 19 million man-hours were for general cargo operations in the Port of New York under Warshipsteve contracts.

690

Q. For what period? A. That is for the second, third, fourth; and first quarters. Let's see if I added these up right. 19 million—

The Court: Have you got 8 weeks?

Q. What is the answer? I did not hear what you said. A. It could be that this 19 million figure is just for general cargo, while the man-hours we have covers all types of cargo.

The Court: Then we ought to know. Can you tell us what is the fact?

Q. Let us get at it. What is that paper you have there in front of you, please? A. This is for general cargo. This chart has to do with general cargo.



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Q. What do you mean by general cargo? Is there any distinction implicit in the use of that word between that kind of cargo and any other kind of cargo? A. Yes. In addition to general cargo there is lumber which is separated out and there are cargoes such as coal and other cargoes which are bulk cargoes, and then there may be other—

The Court: How about wet cargo?

The Witness: And wet cargo.

Q. This is entitled "Man-hours of longshoremen in the port of New York 1944 and 1945." A. That is right.

692

Q. And you have made up a graph here by quarters and by thousands on your vertical coordinate. A. That is right.

Q. From what source did you get the information which is graphically represented on that chart? A. The War Shipping Administration analysis of cost of stevedoring operations, loadings and discharges, general cargo.

Q. Will you simplify that a little bit as to what it shows? A. Well, the War Shipping Administration has made quarterly summaries of the general cargo operations under Warshipsteve contracts.

Mr. Goldwater: Will you explain fully what Warshipsteve means? You will have "warship" on the record.

693

The Court: That word has been used in this courthouse so many times in the last three years—

Mr. Goldwater: Your Honor is thoroughly familiar with it, but the record does not show that it has been used in the courthouse so much.

Mr. Taylor: That is a stevedoring contract with the War Shipping Administration.

Mr. Goldwater: That is what I would like to have stated. I do not object to its being used in



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this trial at all. It was only to make it clear for the record.

The Witness: So, this 19 million man-hours—

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Q. Wait a minute. We have not got to that yet. Has this chart here any function at all? Is that to enable you and Dr. Reed to determine as near as you can the period during the war years when the maximum amount of cargo moved out of the port of New York? Is that what you have it for? A. The purpose of this chart was to determine what quarter or quarters had the largest number of man-hours of stevedoring operations in the port of New York. And we found in a preliminary way by looking at the general cargo summary figures that in the fourth quarter of 1944 peak operations were in effect for general cargo.

Q. And it was on the strength of that, whether it was the best procedure or not, that you decided under the instructions from Mrs. Schleifer and myself that in compiling the data which is on this large tabulation you would include the fourth quarter of the year 1944? A. That is right.

696

Q. And then would take samplings of two weeks out of each quarter backward and forward from that peak quarter; is that right? A. That is right.

Q. And you did not go beyond the first quarter in 1945 because you thought—there is some relation to V-E Day or the tapering off of the war or something of that sort? A. After V-E Day you would not have war experience or total war experience, and the period—the complete year before that included the peak period.

Q. So, having found the peak quarter you then took two weeks out of the succeeding quarter and two weeks out of each of the preceding quarters; is that right? A. That is right.



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Q. And those are the periods covered by this study, for whatever they are worth?

The Court: How many man-hours are embraced in these eight weeks?

The Witness: In the eight weeks we made a count of 4,300,000 man-hours.

The Court: You don't really know, therefore, the exact man-hours for the entire 52 weeks period?

The Witness: No; we didn't count all of the man-hours for the 52 weeks. We counted just the sample of 8 weeks.

698

Q. How many New York stevedoring concerns had Warshipsteve contracts whose figures for the weeks in question are incorporated into this report? A. There were 47 New York companies which had stevedoring work during the sample periods, and all of their work during the sample periods is included in that particular summary.

Q. Now, the basic information for those selected weeks for those companies was obtained from what type of report, document or material?

The Court: He told us. An invoice.

699

Q. Did I cover that sufficiently? A. Yes.

The Court: Yes.

Q. Do those invoices give the number of men employed at each hatch at the starting time and finishing time? A. Yes.

Q. Will you tell us how you went about it, from that source material, to compile this chart?

Mr. Taylor: Unless you want to waive accuracy, I assume I have to go into it.



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The Court: You are not going to object on the ground that those invoices are not here?

Mr. Goldwater: Oh, no. That is the purpose of my stipulation. As your Honor put it before, we are not objecting to the competency of the testimony.

The Court: All right.

701

A. The man-hours and instances from each invoice was listed on a work sheet and then summarized by quarters and then annually, and this sheet then is the summary of the additions of the man-hours that were listed under each of the appropriate columns. The columns are: No. 1, total number of man-hours worked; is that right? A. Yes.

Q. 2, total number of straight time man-hours worked; No. 4 total number of overtime man-hours worked—

The Court: We will all agree that by "overtime" you mean overtime as defined in I. L. A. agreement but not any other agreement that they might have?

Mr. Taylor: Yes; I was just going to ask him that.

702

Q. (Continuing)—total overtime man-hours worked Saturday afternoon, Sundays, holidays; total number of overtime man-hours and number of instances involved between 5 p. m. and 8 a. m. exclusive of Sundays and holidays; total number of man-hours and number of instances of work after 5 p. m.—am I interpreting that right? A. Yes.

Q. Between 5 p. m. and 8 a. m. for men who had worked no straight time hours during the same day.

Mr. Horn, you have brought here at my request, have you not, your work sheets and samples of the original source material? A. Yes.

Q. Did you yourself supervise, have direct charge of all of that transcription of information from the original



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source material to the work sheets, to the chart, through the calculating machines for the purpose of percentages and so forth? A. I had several assistants taking the information off the invoices, and I directly supervised all of the work that was done in getting the information into summarized form that could be used here, from the invoices, through the work sheets and to the final summary.

The Court: We will suspend at this point.

(Short recess.)

704

Mr. Goldwater: May we come up and speak to your Honor?

The Court: Come up.

(Conference at the bench between Court and counsel.)

Q. Mr. Horn, have you an opinion as to whether or not this statistical chart accurately records the information which it purports to record, as stated in the source material from which you worked? A. I believe it is as accurate as any statistical material can possibly be.

705

Mr. Taylor: I offer it.

Mr. Goldwater: Now if your Honor please, I object to its admissibility in evidence, on grounds which appear on its face. In the first place, from the standpoint of its relevancy and materiality generally I say it has no relationship to the issues which are before the Court on the pleadings in this case.

Next, I say that the chart is of no probative value, since it covers a two weeks period in each quarter for one year, whereas the case before your Honor



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covers the period not only of that one year which is involved in the chart which is offered, but of two previous years.

I point third to the fact that the exhibit covers 47 companies unidentified, and I assume that Mr. Taylor will say, as he has said with respect to other exhibits, that he will not identify the companies, and I assume for the purposes of this objection your Honor would not require a disclosure of the companies, and therefore no proper cross-examination can be made with respect to the exhibit.

I say, further, that it is valueless from the standpoint of comparison with other exhibits which your Honor has admitted in evidence, since it includes 47 companies and the other exhibits include 17 companies.

I say, further, that it is valueless and inadmissible because with relation to the exhibits which your Honor has admitted—Exhibits D. and E—of the 17 companies there named three companies are omitted, if the symbols are intended to be indicative of identical companies in the exhibit which is now offered. It further appears that it has no comparative value, because of the fact that in this exhibit now offered there have been omitted the columns from 12 to 23, inclusive, which columns have reference to the number of overtime hours worked after daytime hours of 8 to 6, 6 to 4, 4 to 2, 2 to 0, showing in columns 13 to 23, inclusive, not only the actual number of hours but the comparison with the total number of hours worked and the percentages resulting therefrom. I think that that embraces all of the grounds of the objection to this exhibit.



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Mr. Taylor: Before your Honor rules may I ask the witness a question or two further about this?

The Court: To qualify it?

Mr. Taylor: Yes.

The Court: Go ahead.

By Mr. Taylor:

Q. Mr. Horn, the first 17 companies on this table which I am trying to get into evidence are the same 17 companies that appear in the other statistical studies in evidence, are they not? A. Yes, they are. 710

Q. And have the same code designations that they carried on the other studies; is that right? A. That is right.

Q. And with respect to those several instances, the three instances where no information appears on this chart with respect to some one of those 17 companies, what is the reason? A. Those particular companies happened to be working on other than Warshipsteve contracts, namely, Navy contracts or War Department contracts during the period we were interested in.

Q. You didn't pick the period for that reason, but for the reason you have already told us? A. That is why there is no figure for those companies. 711

Q. With respect to the omission on this study of the breakdown which occurs in the others in each of which you had recorded the number of instances and the number of man hours involved in the case of men who worked 6 to 8, 4 to 6, 2 to 4 and so on, and then continued on into the night, why was that information omitted from this study?

Mr. Goldwater: I object on the ground that the reason for its omission is not important to the inquiry.



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The Court: I will let him answer, because it might show a ground other than bias. I will let him answer, to exclude that possibility.

Mr. Taylor: That is all I am offering it for.

By the Court:

Q. What was the reason? A. That kind of breakdown in information was not available to us.

Q. In other words, the invoices did not carry any such breakdown? A. That is right.

713

Mr. Taylor: Now does your Honor care to hear from me before ruling?

714

The Court: I don't think so. I will allow it in, for the very limited purposes for which I would use a chart of this kind, and I would use it just for this purpose: if the War Shipping Administration had published a work on the subject of its war experience in connection with stevedoring and the book was on the shelf on the 25th floor, and I wanted to know something about it I would read it, even though it would not be evidence in the strict sense of the word. And of course this is not evidence in the strict sense of the word. Neither the plaintiffs nor the defendants are mentioned in this exhibit. Maybe one of the defendants is mentioned. If so it is purely coincidence. But it does throw a little light upon this segment of economy. Purely in that limited manner I will accept it. If you want it marked in evidence it will be marked in evidence, but it will be treated in the limited fashion that I have indicated.

Mr. Taylor: I hope before we get through I am going to make you think they are better than you have indicated.

The Court: All right



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By Mr. Taylor:

Q. Mr. Horn, I show you copies of the two photostats which have been marked Defendants' Exhibits G and H for identification?

Mr. Taylor: Have you got those?

Q. What are they Mr. Horn?

Mr. Goldwater: Has this been marked now as an exhibit?

716

The Court: It should be.

Mr. Goldwater: I would like to have the number and the letter.

The Court: Will you give it to the clerk and he will mark it.

Mr. Taylor: I have given it to him and he has marked it.

Mr. Goldwater: What is the letter? That is all I ask for.

(Marked Defendants' Exhibit J.)

Q. Now what are the exhibits marked G and H for identification? A. Chart G is a summary pie graph,—

717

Mr. Goldwater: What kind of graph?

The Witness: Pie graph.

The Court: P-i?

The Witness: P-i-e.

A. (Continuing)—showing the percentages of total time which were straight time, Saturday afternoon, Sunday and holiday time, time between 5 p. m. and 8 a. m. worked by men who had previous work on the same day, and time



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between 5 p. m. and 8 a. m. worked by men who had no previous work on the same day:

The Court: And is that a transposition from Defendants' Exhibit J?

The Witness: No.

Mr. Goldwater: No.

Q. The period covered is what? A. The period covered is November 1, 1938 to August 1, 1939.

Mr. Goldwater: It is E, your Honor.

719

The Witness: It is the earlier segment.

The Court: It is a picturization of Exhibit E?

Mr. Taylor: Yes.

The Court: In some aspects of it?

Mr. Taylor: Yes.

The Witness: Now Exhibit H is an identical chart with identical headings, which show the similar relationships from—

Q. Just admitted? A. From Exhibit J just admitted.

Mr. Taylor: I offer it.

The Court: It is like an accountant's summary of entries in a book. If the book is admissible I suppose the summary is admissible.

720

Mr. Goldwater: The objections of course are made on grounds that the basis of the picturization is objectionable, and therefore this summary is objectionable.

The Court: I will receive it.

Mr. Taylor: Exhibit G for identification becomes Defendants' Exhibit G in evidence.

The Court: G in evidence.

(Defendants' Exhibits G and H for identification marked in evidence.)

Mr. Taylor: Your witness.



Cross Examination by Mr. Goldwater:

Q. Mr. Horn, have you brought with you samples of the invoices which you have described as the basis for Exhibit J in evidence? A. Yes, I have.

Q. May I see some of those samples? A. (Hands papers to counsel.)

Q. You have handed me one sample, and I would like to know what method you have used in determining what samples you would bring with you? A. I more or less took them out of the files, a few from each of several companies.

722

Q. And what was your method of determining which companies' files you should select these samples from? A. Well, I think that I just went along and took them out of top drawers.

Q. Did you know what was in the top drawers when you took them out? I mean whose files were in the top drawers? A. You mean which companies?

Q. That is right? A. Well, it is possible. I have a list of the companies whose files I happened to take along with me, and they include some—

Q. That is not important at the moment.

723

By the Court:

Q. How did the companies get into the top drawers? Was it an index of quality or alphabetical coincidence?

A. Alphabetical coincidence.

Q. You don't mean by "top drawers" what an Englishman means by "top drawer"? A. What is that?

The Court: Well, we will forget that.

By Mr. Goldwater:

Q. Were they arranged alphabetically? A. Yes.



724

*Donald R. Horn—For Defendants—Cross.*

Q. And you selected then a company which began with "A"? That happens to be the sample you handed me.

A. Well, that is—yes.

Q. Are all the samples you have brought of companies whose names begin with the letter "A"? A. No. There happen to be four and five "As", and six "As", and then it gets into "Bs" and "Cs", and then it drops to "H" and "M".

725

Q. Then you would say that the selection happened because of the method that you used to follow the alphabetical line? A. Well, it was just chance selection. There was no selection. I just took some.

The Court: Random picking?

The Witness: Random picking.

Q. But this random picking resulted in following the alphabetical line? A. Yes.

Q. Did you bring all of the samples for the company whose sample you just handed me, the American-West African Line, for example? A. No.

726

Q. How many of these out of how many did you bring? I mean, approximately, Mr. Horn? It is not important to have the number accurate. A. 50 or 60 invoices.

Q. Out of how many? I am trying to get the percentages. A. Well, there were 50 boxes, so big by so big (illustrating).

The Court: Two feet by one foot? The stenographer has a little trouble in transposing the gesture.

The Witness: There were approximately 50 legal sized file drawers full of these.

Q. Well, there would be several thousand? Would that be a fair statement? A. Yes.



*Donald R. Horn—For Defendants—Cross.*

727

Q. Then you have about 50 out of several thousand?

A. Yes.

Q. Is that a fair sample of each of the companies— A. No, four or five of each of the companies.

Q. You have a total of approximately 50 out of many thousands? A. Yes.

Mr. Goldwater: I would like to examine this for just a few minutes, your Honor, before we—

(Defendants' Exhibit J marked in evidence.)

Mr. Goldwater: May I have two or three, indiscriminately, to examine at the same time.

728

Q. Mr. Horn, the samples which you have handed me I assume are fairly typical of all of the invoices which you used in making up this chart? A. Yes, they are.

Q. And was there any great variance in these invoices one from another, or one group from another, which you would like to point out? A. They were all done according to the regulations and the methods laid down under Warshipsteve contracts, and all the regulations were identical for each stevedore.

Q. And they substantially comply with those instructions and regulations, would you say? A. Yes.

729

Q. The samples you have handed me would indicate that as part of each invoice there is a schedule supporting it? There was supplied a tabulation showing the hatch where each man or group of men worked—gang worked? A. That is right.

Q. And the specific hours worked by the group, gang or the individual? A. That is right.

Q. Is that right? A. That is right.

Q. And showing which of those hours were during the daytime and which during the night time? A. That is right.



*Donald R. Horn—For Defendants—Cross.*

730

Q. By night time I mean hours after 5 p. m. Do you understand it? A. Yes.

Q. The schedule also shows the total of man hours, both on so-called straight time and so-called overtime; is that correct? A. Yes.

731

Q. Could you, from this schedule which is attached to each one of these invoices, have prepared what I am told would be called a frequency distribution—that is a statement showing the number of men who worked during the day hours for eight hours, seven hours, six hours, five hours and so on, and similar information with respect to the number of men and number of hours worked after 5 p. m. at night? A. No.

Q. You could not have done that? A. No.

Q. May I refer you to this invoice and ask you whether you understood that the previous questions that I asked with respect to the schedule pertain to this sheet which I now show you and is part of the sample which you showed me, that is the sheet showing the hatch or the description of the place worked? A. That is right.

Q. The number of men who worked at that point and the hours which the men worked? A. Yes.

732

Q. Specific hours? I mean the time of day? A. Yes.

Q. And the same information with respect to overtime, where there was overtime, that is time after 5 p. m.?

A. It may have been possible to make a selective distribution, that is, by selecting certain of these invoices which show it, in such a way that you could be certain that the men that worked from 8 to 12 in the morning also were the same men that worked night.

Q. Well now, I didn't ask you whether they were the same men that worked at night; I asked you whether you can show—

Mr. Taylor: Isn't that what you asked?



*Donald R. Horn—For Defendants—Cross.*

733

Mr. Goldwater: Oh, no.

Q. I asked whether you could show from this the number of men who worked during the day eight hours, seven hours, six hours, five hours, four hours and so on, and the number of men who worked similarly after 5 p. m.? A. Without regard to—

Q. Without regard first as to whether they were the same men, yes. A. Yes, it would have been possible to make such a count.

Q. Why didn't you make such a count? A. I was not asked to make a count of the number of men who worked at 8 o'clock or who worked at 9 o'clock or 10 o'clock, or the men who worked at 7 o'clock at night or other times. I was asked to make a summary of the number of man hours worked days, straight time, and overtime, and overtime by men who had worked straight time.

734

Q. Now how could you tell which of these men worked overtime who had worked straight time? A. You can tell by an analysis of the overtime, that any man who worked less than four hours overtime had some straight time during the day.

By the Court:

735

Q. How could you tell that? A. The collective bargaining contract states that if a man is brought to work overtime he must be assured of four hours work. In these cases any man who worked less than four hours work had day work.

Q. Supposing he had more than four hours work, then you couldn't tell? A. If they had more than four hours work they were assumed to be fresh men, if they came on at seven o'clock.

Q. That is based entirely on assumption? A. Well, here was a choice—



736

*Donald R. Horn—For Defendants—Cross.*

Q. I don't care whether there was a good reason, but that was in fact an assumption? A. It was done by assumption, and the idea was that if there were some men who worked more than four hours who had worked during the day we would put them on the side that would benefit the other—Mr. Goldwater's claim rather than—

Q. How did you know which side the statistics would favor?

Mr. Goldwater: I am glad your Honor asked that question. I might not have had the courage to.

737

Q. I don't know which side the statistics would favor. You may have some prescience that I haven't got. A. In order to check for sure that making that sort of assumption was reliable, I came to New York and I questioned 16 different stevedoring companies, both bookkeeping departments and their timekeeping departments and their hiring people to find out if when they worked night overtime they worked the same men or other men, if they worked more than four hours, and in every case they said they tried to get fresh men if they could.

Q. All right. Now which column does that deal with? A. 24.

738

The Court: Column No. 24.

By Mr. Goldwater:

Q. You relied entirely upon what the bookkeeping department told you; is that right, in making that assumption? A. No; on the collective bargaining contract primarily, and then substantiated by the opinions of other people.

By the Court:

Q. Let me be sure that column 24 is composed of those persons who worked overtime. That consists of



all men who worked more than four hours overtime?

A. Yes.

Q. And that is what we really ought to change the caption of that column to read? It is the total number of man hours and number of instances worked by men who worked more than four hours overtime? Isn't that what it really is? Does it mean any more than that? Now you might then translate that into anything you like, but that is what the fact is? Am I correct?

A. Yes, that is the fact, but it is also a fact that those men were largely fresh.

Q. As far as you know. But as far as the records from which you drew your statistics are concerned all you can say with assurance, as far as the invoices are concerned, that it is a tabulation of men who worked more than four hours overtime in any one day? A. In any one night.

Q. In any one night? Right? A. That is right.

By Mr. Goldwater:

Q. Now you relied upon the statements which were made to you, as I understand you, with respect to the attempts of the company to get fresh men where they worked nights; is that true? A. That is right. Well—

Q. And you assumed that their attempts to get fresh men were successful? A. No, I assumed that if there was an error in this business of putting some men who worked overtime, who had been the same men into this column, that it was not going to be a discrimination against anything that you may want to show. In other words, we show the minimum number of men who had straight-time time during the day who worked on over into overtime. If you take it the other way around, there are no men who worked straight



742

*Donald R. Horn—For Defendants—Cross.*

time—there would be no men who worked overtime and also worked straight time in that count, but there may be in the other count some men—column 24—some men who had straight time. In other words, there may be too many men—too many man hours listed in No. 24, but there is no chance of it being the other way.

743

Q. Let me ask you, Mr. Horn, had you any information as to the frequency with which fresh men were able to be found to work nights? Did you make any investigation of that of your own? A. I came to New York and I asked 16 different companies, the people in them, what their experience had been in that regard, and they said that whenever they had a 7 o'clock shift go on—men coming on after the 7 o'clock shape, 6.55 to 7 o'clock shape—that they tried to get and usually did get new men. The older men—the men that worked all day were getting tired.

Q. That was the extent of your investigation of the fact as to the success which they might have had in getting fresh men; is that right? A. That is right. In other words, column 24 may overstate the number of men.

744

Q. Yes. You have said that before. We understand that. The question is whether you made any other investigation, except inquiring of these 16 companies? A. No.

The Court: Are you planning to bring this witness back on Monday?

Mr. Goldwater: Am I?

The Court: Yes.

Mr. Goldwater: Oh no. I am not inclined to bring him back.

Mr. Taylor: He is here from Washington.

Mr. Goldwater: If your Honor will give us a few minutes I will finish with him.

(Discussion off the record.)



*Donald R. Horn—For Defendants—Cross.*

745

Q. Let me show you this schedule, Mr. Horn. It appears here that next to the last line shows the timekeeper? A. Yes.

Q. 5 to 7? A. Right.

Q. Two hours overtime? A. Yes.

Q. That is ringed. Does that indicate that he is not included in your study? A. That is right.

Q. He is not included? A. The timekeeper being considered an overhead person by the War Shipping Administration in the Warshipsteve contract.

Q. Would this be true, Mr. Horn: If a fresh man worked one night an hour and he quit, or there was no further work for him or he quit, let us say, because he was sick or injured, would he appear in column 24? A. A man that worked actually one hour would have gotten paid for four hours and it would show up as four hours in the invoice. And whether or not he worked one hour or not he would have been billed under Warshipsteve contracts for four hours, three hours appearing in the remarks below as waiting time, or some other reason for not getting—

746

Q. And how would you know or indicate on your study your treatment of a man who worked for one hour before rain?

747

Mr. Taylor: What time of day?

Q. At night.

Mr. Taylor: Coming on fresh at night?

Q. And then knocked off.

The Court: On account of rain?

Mr. Goldwater: Yes.

The Court: Weather.



748 *Donald R. Horn—For Defendants—Cross.*

A. In those cases where they were knocked off on account of rain there was always a remark made on the bottom of the bill some place, and they usually got two hours pay, even though they didn't work, if they showed up and it was raining.

Q. That is why I asked how you treated them if they only got two hours pay and not four hours? A. If they came on at 7 o'clock they would be treated as fresh men.

By the Court:

749 Q. Although they worked less than two hours? A. Less than four hours.

Q. Less than four hours? A. Yes. In other words, when a note was made these men were knocked off because of rain—

Q. You assumed that he would have worked four hours if there were no rain, and you treated him as if he were a four-hour man and therefore a fresh man? A. The contract says they will get two hours pay in case of rain, and each time that happens it is listed in a note.

750 By Mr. Goldwater:

Q. The question is did you treat him as the Judge has asked you, as a new man? A. As a man who had no straight time work during the day, and in all cases where there was any doubt that we couldn't decide, if the note was not clear, then this particular man was counted as a fresh man.

Q. I didn't give you back any of these samples, did I? A. No.

Q. You gave me four? A. I didn't count them.

Q. There are the four back? A. All right, thank you.



*John Francis Barry—For Defendants—Direct.*

751

Mr. Goldwater: That is all.

The Court: You are excused, sir.

Now can counsel step up for a minute.

(Conference of Court and counsel at the bench.)

The Court: This case is adjourned until Monday at 11.30 a. m. Court is adjourned to 10.30 a. m.

(Adjourned to Monday, June 24, 1946, at 11.30 a. m.)

New York, June 24, 1946;  
11:30 o'clock, a. m.

752

### TRIAL RESUMED.

JOHN FRANCIS BARRY, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination by Mr. Taylor:

Q. Where do you live, Mr. Barry? A. 757 East 39th Street, Brooklyn.

Q. Where are you employed? A. Bay Ridge Operating Company. 753

Q. How long have you been employed by the Bay Ridge Operating Company? A. 27 years.

Q. What job do you hold there? A. Payroll clerk.

Q. How long have you been employed by Bay Ridge in connection with payroll work? A. On and off 18 years.

Q. What are your duties with respect to payroll work? A. Compiling figures from the various piers into a master payroll.

Q. We have introduced in evidence in this case, Mr. Barry, some tables relating to straight time and overtime,



754

*John Francis Barry—For Defendants—Cross.*

and included in those tables are some figures from Bay Ridge, and it is stated on the two tables which have been marked Exhibits D and E, I think, that so far as concerns Bay Ridge Operating Company their figures will be only July and August of 1939, rather than covering the whole period covered by the chart, which was from the payroll date nearest November 1, 1938, to the payroll period nearest August 31, 1939. Do you know how it happened that the report from Bay Ridge instead of covering that whole period was limited to the months of July and August, 1939?

755

Mr. Goldwater: I object. That is immaterial. The exhibit speaks for itself. As to what period is covered, and why it is not there, is not material.

The Court: It is material on the question as to whether an inference adverse to the defendant might be drawn by failure to call a witness. I will allow it.

756

A. We had all of our records at that particular time, May, 1941, stored on Pier 4 Bush, Brooklyn. The army came in as the war started, and they took possession of the pier. We transferred all of our records from there to Pier 86, North River, and in transit those particular books were lost and never found.

Cross Examination by Mr. Goldwater:

Q. Mr. Barry, you say the records were first stored in Bay Ridge, on a pier in Bay Ridge in Brooklyn? A. Yes.

Q. How were the records put together for storage purposes? A. We had them in regular cardboard containers, filing containers.

Q. Did you have each month in a separate container, or more than one month in one container? A. As much as was allowed in that particular container.



*John Francis Barry—For Defendants—Cross.*

757

Q. You mean that they were not broken up in containers as to separate months of the year? A. No.

Q. Were there other records besides the 1938-1939 records stored on the dock in Bay Ridge, or the pier? A. Yes.

Q. Were those all lost? A. That I could not say.

Q. Well, all of the months—

The Court: November, 1938, was the beginning month, I think.

Q. All of the months from November 1, 1938, to July, 1939, were lost, as I understand you? A. That is right. 758

Q. And did you say, or do you know whether records prior to that date were also lost? A. I could not say.

Q. Or if records subsequent to August, 1939, were also lost? A. That I could not say.

Q. How do you know these were lost? Did you make a personal search? A. Yes; those were the particular ones we were interested in.

Q. Is what you found the entire months of July and August, beginning with the first day of July and ending with the 31st day of August? A. I could not say the particular date, but it is July and August? What date in July I could not say, the weekend. 759

Mr. Goldwater: May we know, Mr. Taylor, whether the months of July and August are shown in these two exhibits?

Mr. Taylor: That is what it says.

Mr. Goldwater: The full months?

Mr. Taylor: You said yourself that the paper speaks for itself, and you have admitted its accuracy.

Q. Mr. Barry, you said a moment ago that you put as many records in the carton as you could. A. I assume



760

*John Francis Barry—For Defendants—Cross.*

that, yes, sir. I didn't do the particular filing myself. I am going back a period of eight years now. That is when I had last seen those records on the pier.

Q. You didn't say you assumed that a while ago? A. No, I didn't. I am just thinking of it now. Going back eight years.

Q. Are you assuming it now— A. Yes, I would.

761

Q. I don't want to interrupt you. Had you finished your answer, sir? Are you assuming it now because you find that the records are found for the first day of July and ending the 31st day of August?

Mr. Taylor: I object.

The Court: I will allow it. Is that the basis for your assumption, is the question.

A. Yes. I couldn't say particularly whether they were filed month to month or how they were filed.

762

Q. Are there any other records of Bay Ridge available from which we could ascertain the work hours of long-shoremen who worked for Bay Ridge between November 1, 1938, and August 31, 1939, except those that are shown on this exhibit for the two months in question? A. Yes, there is.

Q. There are other records available? A. Yes, sir.

Q. What other records are they? A. The time sheets that came from the piers themselves.

Q. You mean that you could have furnished or there are records available from which you could furnish the information with respect to all of the work hours of long-shoremen who worked for Bay Ridge between November 1, 1938 and July 1, 1939? A. I believe there is, yes, sir.

Q. Mr. Barry, how long have you been working on these transfers from the timekeeper's report to what you called, as I understood you, the master payroll?



*John Francis Barry—For Defendants—Cross.*

763

Mr. Taylor: I object.

The Court: I will allow it.

Mr. Taylor: Did the witness go into that?

The Court: You asked him that question.

Mr. Taylor: I will withdraw my objection.

A. On this particular case or my actual work?

Q. I am talking of the Bay Ridge.

Mr. Taylor: What period?

Mr. Goldwater: I asked him how long he had been working in that employment.

764

The Witness: I don't quite understand the question.

Q. You said that your employment was transferring data which came from the piers from the payroll reports to the master payroll. A. How long I had been at that particular pier? A. 18 years on and off.

Q. That is what I wanted. A. I didn't know you were referring to that particular case—

Q. That is quite all right. If you don't understand you say you don't, as you did. Is it a fact or is it not a fact that Bay Ridge make wage-hour adjustments for work over 40 years a week, particularly for Saturday morning work, following 40 hours during daytime work?

765

Mr. Taylor: Wait a minute. Is that anything that I went into on my direct?

The Court: No.

Mr. Taylor: I object.

The Court: Objection overruled. The only thing you can say is that he makes him his own witness.

Mr. Taylor: All right.



766

*John Francis Barry—For Defendants—Cross.*

The Court: Do you understand the question?

The Witness: Yes.

A. Yes, we compensated the men for any time over a 40-hour period straight time.

Q. Can you tell me when the company first began to make that wage-hour adjustment for those Saturday morning hours after 40 hours of day work? A. No, I haven't that particular date.

Q. Can you tell me whether it was in 1939? A. That is my guess it was; I think it was 1938 when we started.

767

Q. Let me ask you this. I don't want to put words in your mouth. Did you start after the passage of the Wage and Hour Law? A. Oh yes, immediately.

Q. Immediately after that? A. Yes, sir.

Q. Do you know what the work week was for the first period under the Wage-Hour Law? A. No, sir.

Q. You don't know. You don't know it was 44 hours? A. I couldn't tell you, no, sir. At that particular time I was employed as a timekeeper on the pier. I was not a payroll clerk.

Q. Oh, well, now— A. Well, I told you on and off, I have worked as a payroll clerk on and off for 18 years.

768

Q. Mr. Barry, apparently we misunderstood each other. I asked you before how long you had been working in transferring information received from the pier payroll records to the master payroll sheet? A. That is right.

Q. And you said for 18 years? A. On and off.

The Court: On and off he said. This was an "off".

Q. And you were not doing that in 1938? A. No, sir.

Q. You were not doing it in 1939? A. No, sir.

Q. When did you do it? When did you begin to do it? A. I did it in 1920, to 1925, and from about 1940 to



this particular date. In the meantime I have been down on the piers keeping time.

Q. Is the job on the master payroll a higher paid job than the timekeeper's job? A. No, sir.

Q. It is not? A. No, sir.

Q. Is the job on the piers timekeeping a higher paid job than the master payroll job? A. Yes, it is.

Q. Was it, the timekeeper's job, a higher paid job than the master payroll job in 1940? A. Yes, sir.

Q. Notwithstanding that, you went back to the office and did the master payroll job at lower wages than you were getting on the pier? A. That is right.

770

Q. Do you happen to know, Mr. Barry, what the practice was in New Haven with respect to this Saturday morning overtime? A. I have never worked in New Haven.

Q. You had no experience with the company's records that would indicate to you what the practice was there? A. No, I have not.

Q. You say that you know that adjustments were made during the period that you worked on the master payroll beginning sometime in 1940? A. Yes.

Q. When adjustments were made, were they made for the specific week only or was there an adjustment at any time for a retroactive period? A. That I couldn't say. At that particular time I was keeping time on the pier. What occurred in so far as the wage-hour was compiled in the office by the payroll clerks themselves; the timekeepers had nothing to do with it.

771

Q. I ask only of your own knowledge now, and I want to know, when you began making these adjustments in 1940 did you make any adjustments for periods farther back than the current week's work? A. I did not make any at all.

Q. Did the records show adjustments? A. I couldn't tell you. I wasn't in the office, I was on the pier at that particular time.



772

*John Francis Barry—For Defendants—Cross.*

Q. In 1940? A. Yes.

The Court: When did you begin working on the master payroll?

The Witness: Very recently. In December, 1944.

Mr. Goldwater: Apparently, your Honor, the witness's testimony is at variance now with what he said before. Perhaps he did not understand the question.

Mr. Taylor: I could not hear the answer.

773

Mr. Goldwater: He said he began working in 1944 on the master payroll.

The Witness: Back on the payroll. I had originally worked before that, too.

Q. Let us get it clear. You worked on the master payroll prior to 1938? A. Yes, sir.

By the Court:

Q. In 1925. A. Yes, sir.

Q. And you worked on the master payroll from 1925 until when? A. I would say about '27, '28.

Q. Then you quit? A. No, sir. I went out on the piers.

774

Q. You went out on the piers? A. Yes, sir.

Q. When did you go back to the master payroll? A. 1940, in December.

Q. How long did you stay on the— A. Still there, sir.

Q. Now wait a minute. Get yourself collected, sit back and just calm down, and let us get ourselves organized. Let us go over this ground again. Keep your mind on your work. In 1925 you worked on the master payroll, and you worked on the master payroll until about 1927? A. 1928 or 1929.

Q. 1928 or 1929. Then you quit the master payroll work and went out working as timekeeper on the pier? A. Yes, sir.



*John Francis Barry—For Defendants—Cross.*

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Q. You kept at that work until when? A. Until I would say April, 1943, 1944.

The Court: I give up.

Mr. Goldwater: So do I.

The Witness: It was a period—perhaps I can explain it.

Mr. Goldwater: Go ahead.

The Witness: There was a period of a year that I had a breakdown, a nervous breakdown, and I was home for practically a year.

776

By Mr. Goldwater:

Q. What year was that, Mr. Barry? A. 1943 and 1944.

Q. Do we understand now that you went back on the master payroll in April 1943? A. No; back on the master payroll in December 1945. '44. 1944.

Q. Well, during this period when you had the breakdown, Mr. Barry, had you immediately prior to that been working on the pier or on the master payroll? A. On the piers.

Q. So, from 1928 or 1929 until 1944, '45, you never worked on the master payroll again? A. A few days, that would be all. Occasionally I would come in the office if I wasn't busy on the pier.

Q. I will ask you whether you know of your own knowledge at any time from 1938 to 1944 any adjustment for Saturday morning overtime under the Wage and Hour Law was made for a prior period, a period other than the current weekly period? A. No, I have no knowledge.

The Court: Any further questions?



778

*John Francis Barry—For Defendants—Re-direct.*

Re-direct Examination by Mr. Taylor:

Q. What were you doing in 1940, Mr. Barry? A. Keeping time.

Q. On the pier? A. Yes, sir.

Q. I think one reason why you were asked so many questions is because you gave one answer in which you said that you went to the office and were working on the master payroll in 1940. Did you mean to say that? A. No, sir, not in 1940.

779

Q. What were you doing in 1941? A. On the piers.

Q. 1942? A. On the piers.

Q. 1943? A. That was the year I went home sick.

Q. 1944? A. Part of the year I was home sick, in that particular year.

Q. After you got over your sickness you went back to the office? A. Yes, sir.

Q. And you have been there since? A. That is right.

Q. Now, have you ever read the Fair Labor Standards Act? Have you ever read the statute? A. What is that referring to?

780

The Court: The Wage and Hour Law.

The Witness: Yes, sir.

The Court: You have read the law itself?

The Witness: Well, I have been advised of it; I haven't read it.

Q. Do you know that when it first went into effect the maximum number of hours which the statute permitted employers to work their men without paying overtime was 44 hours? A. Yes, sir, I did know that.

Q. And then it went down to 42 hours? A. That is right.

Q. And finally it went down to 40 hours? A. Yes, sir.

Q. Now you told Mr. Goldwater that the Bay Ridge



*John Francis Barry—For Defendants—Re-direct.*

781

Company began allowing the men overtime for Saturday morning immediately the statute went into effect. Did you mean that? A: Well, as I say, Mr. Taylor, it was compiled in the office—

Q. At a time when the statute said you could work 44 hours without paying overtime you didn't make any wage-hour adjustment then, did you? A. No, sir, we did not.

Q. Is it true that when the statute brought the number of straight time hours down from 44 to 42 that you then began making adjustments on 42 straight time hours? A. That is right.

782

Q. When it went down to 40 and ever since then you make the adjustment for hours in excess of 40 straight time hours? A. Yes, sir. We abided distinctly by the ruling.

Q. When you make the adjustment, Mr. Barry, do you make it in such a manner as will bring the overtime adjustment up to what the contract calls for? Do you understand the question? If you don't say so. A. No, sir, it is not quite clear.

Q. You know that the straight time pay for general cargo is \$1.25 an hour or was until the present contract— A. At that particular—

783

Q. —the overtime rate was \$1.87½ an hour, and that the difference between this is 62½ cents an hour; so when you make the adjustment for people working on general cargo you make the adjustment in the amount of 62½ cents an hour?

Mr. Goldwater: I object to the form of the question.

A. That is right.

The Court: It is leading.



784

*John Francis Barry—For Defendants—Re-direct.*

Mr. Goldwater: You are putting the words in the witness's mouth.

The Court: Yes. I will allow it.

Q. In the case of the men, if you had such men, that had worked 40 straight time hours, then they worked on Saturday morning, but it was a case oil gang handling kerosene, under the contract the straight time rate is \$1.45 and the overtime rate is \$2.17½, a difference of 72½ cents; at what figure did you make that adjustment?  
A. It will be 72½ cents.

785

Q. You said, Mr. Barry, in answer to one of Mr. Goldwater's questions that notwithstanding the loss of certain payroll records after the Army took over your pier in Brooklyn that there still are in existence records from which you could have gotten information which according to Mr. Walker's letter he said was not available. Is that what you meant to say? A. No, I can't—I know we just caught those two months, those particular time sheets.

The Court: Will counsel come up.

786

(Conference at the bench between Court and counsel.)

Q. Mr. Barry, will you tell us what kind of records it was that were lost in transit between the piers when the army took over the pier in Brooklyn? A. I know distinctly that the payroll books were lost. I know that because that was what we were originally working from. As far as the time sheets were concerned, I am not positive whether they were lost or not, but we had those two months, I know that, that July and August that we made up.

Q. Did you yourself do any work for Bay Ridge in getting together the figures as to total man hours—



straight time man hours, total overtime man hours, and the overtime worked after 5 o'clock, which were reported to us? A. Yes.

Q. When you were getting up those figures did you record that information, so far as it was actually available, from any records of the company? A. Yes.

Q. What did you mean, then, Mr. Barry, when you told Mr. Goldwater that there were records in existence from which that information could be gotten? A. For those two particular months?

Q. No, for the months that you did not— A. That I could not say. I do not know where they are.

Q. Do you wish to change your answer, then? A. Yes; I mean what we had given you was all that was available at that particular time when we were looking it up.

Q. You did not want Mr. Goldwater to understand that there were records in existence from which you could have gotten that information, outside of the months of July and August, if you wanted to? A. That is right, they were unavailable. We could not find them.

Re-cross Examination by Mr. Goldwater:

Q. Do you know that the time sheets that you told me were available before were actually lost? A. We could not find them; yes, sir, we could not find them.

Q. You say now you did not understand me when I asked you whether there were other sheets available from which this information could be obtained? A. I thought you meant those sheets you are holding there now.

Q. How did you know what these sheets are? A. I made them up myself from our time sheets. That is, I made up something similar to it in my handwriting. I recognize it.



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*John Francis Barry—For Defendants—Re-cross.*

Q. Let me ask you whether you identify these three sheets I now show you, which are marked Thursday, March 30, 1944, March 31, 1944, Friday, and March 31, 1944, Friday, and ask you if they are in your handwriting? A. No, they are not in my handwriting.

Q. Can you identify the forms of these sheets, Mr. Barry? A. Yes, sir.

Q. Are they the forms regularly employed by Bay Ridge in keeping a record of the time worked by the men on the Bay Ridge piers in longshoremen work? A. Yes.

791

Q. And what were you doing for the company in March, 1944; what kind of work? A. March, 1944, I was not working. That was the period when I was home sick.

Q. I show you one other sheet, which is marked— A. March 30th.

Q. Thursday, 3-30-44. Will you identify that form, or can you identify that form? A. Yes.

Q. What would you call that form? A. Time sheet.

Q. And is that a record, a summary record of the time worked on that day by all men doing longshoremen work for Bay Ridge? A. Not all the men; no, sir.

792

Q. Which men, or what portion of them? How would you identify this?

Mr. Taylor: Do you ask him to interpret the document, or testify to some independent information?

Mr. Goldwater: I am asking him to tell me what this sheet, as he is familiar with the records of the company, indicates it is a record of.

Q. Now what is it a record of? A. A record of the men as they worked on the pier at that particular time, but it does not constitute the entire pier. You may get 20 or 30 of these from one pier alone, which would vary



*John Francis Barry—For Defendants—Re-cross.*

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according to your check numbers here, as you notice at the top here, the serial number. Do you see it?

Q. The numbers 1701, 1702, 1703, and so forth. The last digits being in printed numbers, and the first, second or third, as the case may be, being in crayon or ink; are they indicative of the men's tag numbers? A. That is right.

Q. Am I using the right number? A. Check number.

Q. Check number? A. Yes.

Q. In this first column, 1701 has something written opposite it. Can you interpret that, and what does it mean? A. 8 to 12, 1 to 7 a. m., in the morning. 8 o'clock to 12 noon, 1 p. m. to 7 p. m.

794

Q. In the next column there appears to be an 8 check, and 2; what does that mean? A. Eight hours straight time and two hours overtime.

Q. The rest of that first column, down to the number 1917, appears to be blank; would that indicate that none of the men had the checks from 1702 down to 1750 worked at all? A. They could be working on another sheet, on a different account. As I say, you may get 20 or 30 of these sheets in one day.

Mr. Goldwater: I would like the first three sheets marked, together with those indicating Thursday, March 30th and the two of Friday, March 31, 1944, as one exhibit.

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(Marked Plaintiffs' Exhibit 11 for identification.)

Mr. Goldwater: And the single sheet last identified by the witness, dated Thursday, March 30, 1944, I would like to have marked for identification.

(Marked Plaintiffs' Exhibit 12 for identification.)



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*John Francis Barry—For Defendants—Re-cross.*

Q. Mr. Barry, will you look at this photostatic sheet. May I ask you to identify that form, and tell me if you can what it represents? A. It is a payroll sheet.

Q. It is a payroll sheet of Bay Ridge? A. That is right, yes.

Q. Does this show the number of hours worked by the men whose brass checks are indicated over at the left, in the lefthand column, extreme left, for each of the days of a week beginning with Monday and ending with Sunday? A. That is right, yes.

797

Q. There is no date on this indicating the week covered? A. No, there is not; no.

Mr. Goldwater: I ask that it be marked for identification.

(Marked Plaintiffs' Exhibit 13 for Identification.)

798

Mr. Goldwater: Mr. Taylor says that we may state for the record that, subject to his check, this sheet which is undated, Exhibit 13 for identification, would appear to be the payroll sheet showing payroll for the week including March 30, 1944, of which the time sheet is marked Plaintiffs' Exhibit 11 for identification, for workmen bearing check Nos. 1833 to 1843, inclusive, whose time is also covered by Plaintiffs' Exhibit 11 for identification. In other words, Mr. Taylor wants to check it to be sure this is the same week. There appears to be identity of hours, but there might be identity of hours in another week. That is the point. It is not very likely to be that way, with such a large number of persons employed. However, he would like to check it.

The Court: Very well; I understand.



*John Francis Barry—For Defendants—Re-direct.*

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Mr. Goldwater: Now if your Honor pleases, I would like to offer in evidence Plaintiffs' Exhibit 11 for identification.

The Court: If there is no objection it will be received.

Mr. Taylor: I would like to know for what purpose it is being offered.

Mr. Goldwater: For the purpose of showing the manner in which the payroll records were being kept by the company.

Mr. Taylor: No objection.

Mr. Goldwater: And the same with respect to Plaintiffs' Exhibits 12 and 13 for identification?

The Court: Without objection they will be received.

(Plaintiffs' Exhibits 11, 12 and 13 for identification marked in evidence.)

Q. Is the manner of keeping the records, the time sheet records, and the payroll sheet records of Bay Ridge, similar throughout the period 1943, 1944 and 1945 to the manner which is shown on the exhibits which you have just identified? A. With the exception that they are filed in a book. They are not loose like that.

Q. But the system was exactly the same? A. Yes.

Re-direct Examination by Mr. Taylor:

Q. Mr. Barry—

Mr. Taylor: I wish to call to your Honor's attention that your Honor will of course notice that these are photostats and therefore show nothing at all as to the color of the pencilling or the pen and ink in which entries are made.

The Court: That is correct.



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*John Francis Barry—For Defendants—Re-direct.*

Mr. Goldwater: The photostats were furnished by you to us, were they not?

Mr. Taylor: Yes, sure; I furnished you everything that any reasonable person should furnish you with.

Mr. Goldwater: That is in some dispute, but these exhibits were furnished by you.

The Court: Please; this is completely out of bounds for me.

803

Mr. Taylor: You knew there was red and black on here perfectly well.

Mr. Goldwater: What?

The Court: Do you want to bring out that there are color differences in the original?

Mr. Taylor: Yes.

The Court: Put your question.

Q. In making up these sheets, which are called the time sheets, similar to this one which I am showing you and which has been marked Plaintiffs' Exhibit 12, did the timekeepers use different colored crayons? A. That is right.

Q. What color did they use? A. Red and black.

804

Q. When did they use black and when did they use red? A. Red for overtime, black for straight time.

Q. Where you have an entry, as this one to which I am now pointing, where it reads 8 to 12 in one column, then in the next column to the right 1 to 7, and then in the next column 8 to 2, in what color would the figures 8 to 12 be written? A. In black.

Q. What color would be used for "1"? A. Black.

Q. What color would be used for "7"? A. Red.

Q. What color for "8"? A. Black.

Q. What color for "2"? A. Yes.

Q. Directing your attention to Exhibit 13, can you tell us whether or not, on the payroll sheets or book, what-



*Julius Philip Bayer—For Defendants—Direct.*

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ever you call it of which Exhibit 13 is the form, you used different colors of ink? A. We did.

Q. What were the colors? A. Red and black.

Q. When did you use black? A. Black for the straight time work and red for the overtime work.

(Witness excused.)

**JULIUS PHILIP BAYER**, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

806

Direct Examination by Mr. Taylor:

Q. Where do you live, Mr. Bayer? A. Flushing, Long Island.

Q. What is your business? A. Paymaster, Huron Stevedoring Company and the Grace Line.

Q. How long have you held that position, Mr. Bayer? A. 28 years.

Q. Tell us a little bit about your work, how many people are under you and what your job is down there? A. I supervise the payment of the payrolls for the Grace Line and the Huron Stevedoring, and we have about 13 or 14 in the department. We make up the payrolls for the longshoremen, the checks and so forth on the docks, and we audit the steamer payrolls.

807

Q. Are you the head of that department? A. That is right.

Q. Were you head of the department during the period covered by this suit, which is roughly 1942 to the first part of 1945? A. Yes.

Q. Are you able to tell us what the practice of the Huron Stevedoring Company was with respect to the payment of men, longshoremen who had worked 40 straight



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*Julius Philip Bayer—For Defendants—Direct.*

time hours during the week after the date when under the Fair Labor Standards Act the 40-hour week was the maximum amount fixed by the statute? A. We paid them time and a half for the 4 hours above the 40 hours.

Q. You mean if they worked Saturday mornings? A. If they worked over 40 hours.

Q. If a man had worked 40 straight time hours and then continued to work during the contract straight time hours on Saturday morning, you would pay him time and a half for such time as he put in on Saturday morning? A. That is the practice.

809

Q. At what rate did you pay him under such circumstances? A. At the rate that he was working on under the contract.

Q. You paid him the overtime rate stated in the collective bargaining agreement, whichever it might be? A. That is right.

Q. Depending on whether the cargo he was working on— A. If he was working on penalty cargo he received the penalty time.

Q. As stated in the collective bargaining agreement? A. That is right.

810

Q. And if he was working as a gangwayman or header you made him those allowances also? A. That is right.

Q. Is it true, Mr. Bayer, that the summaries of the employment, showing you a number of photostatic pages which we have marked in this case as Plaintiffs' Exhibit 7, and I want to ask you whether or not, except for the pieces of paper which have been pasted onto these pages, you were in charge of the preparation of those documents? A. Yes, that is right.

Q. It was under your supervision that these summaries were prepared from the original records of the Huron Stevedoring Company? A. That is correct.

Q. And then photostated? A. That is correct.



*Julius Philip Bayer—For Defendants—Direct.*

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Q. Now, I have agreed in this case that with respect to these particular ten or more claimants who have brought suit against the Huron Stevedoring Company, that when 11 hours work appears recorded here in the overtime hours of the day, that it is work done at night, whether it occurred on a Saturday, a Sunday or a holiday, and you checked the records at my request to see whether that was true or not? A. Yes.

Q. And found it was true, with the exception of one day with respect to the plaintiff Fleetwood? A. Yes.

Q. Is that true generally in Huron employment of longshoremen? Well, the question evidently is not clear. I will ask it differently.

812

During the period covered by this suit did the Huron Stevedoring Company employ longshoremen during the day as many as 11 hours? A. Yes.

Q. And during the daytime hours? A. Yes.

Q. Under your practice and according to the terms of the collective bargaining agreement which put holidays and Sundays into the overtime period, is it true that you would enter as overtime work work done by longshoremen on Sundays or holidays regardless of the hours of the day when the work was performed? A. That is right.

Q. Is it a fact that during the period 1943 to 1945 or we will say more broadly during the wartime period that Huron and Grace Lines did work longshoremen long hours during the daytime hours on Saturdays and Sundays and holidays? A. Right.

813

Q. And can I therefore get from you the conclusion, the statement as a fact, that what I have agreed to with respect to these ten selected plaintiffs is not true generally with respect to the Huron Stevedoring Company?

Mr. Goldwater: If your Honor please, I object to the conclusion which the witness draws. If he wants to testify to the fact and it is material—



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*Julius Philip Bayer—For Defendants—Direct.*

The Court: I think you have got as much from him as you can, which is that there were cases in which they worked men 11 hours during daylight hours.

Mr. Goldwater: On Saturdays, Sundays or holidays.

The Court: Or on weekdays.

Mr. Goldwater: Yes.

The Court: They could work from 7 to 7 and still work 11 hours.

Mr. Goldwater: Not under the contract.

815

The Court: That would not make up the point that overtime meant straight time—

Mr. Goldwater: No, because the straight time hours—

The Court: Well, I said he could work 11 hours during the daylight. No question that he could.

Mr. Goldwater: Of course.

The Court: And there were cases where they did.

The Witness: Right. If I may add, I might say that our operation during the war was practically around the clock, day in and day out, except the exception was Saturday nights.

816

The Court: In other words, you kept the piers as busy as you could?

The Witness: That is right.

The Court: And the men as busy as you could?

The Witness: Yes.

The Court: And your gear as busy as you could?

The Witness: Yes.

Q. And you recorded all the time worked by any of your longshoremen on your payroll records? A. That is right.

Q. If it happened to be performed on a Sunday or on a



*Julius Philip Bayer—For Defendants—Cross.*

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holiday you would enter it on the pay records, that is, those records which were concerned with the rate of pay you would enter it as overtime work? A. That is right.

Q. But on the original time sheets, coming in from the timekeepers on the pier, they were by the hours actually worked? A. That is right.

Q. Including the daytime hours? A. That is right.

Q. You say that they did during the war period work practically around the clock; in other words, worked day-times on Saturdays, Sundays, holidays, as well as the days Monday to Friday? A. That is right.

818

The Court: Which days do you define as holidays?

The Witness: Well, all the legal—

The Court: Are they defined in the contract?

Mr. Taylor: They are.

Mr. Goldwater: They are.

The Court: Never mind then.

Mr. Taylor: Your witness.

Cross Examination by Mr. Goldwater:

Q. Mr. Bayer, his Honor asked you whether it was not possible or whether it was possible that men would work during daylight hours 11 hours apart from Saturdays, Sundays and holidays and your answer was it was possible; is that right? A. That is right.

819

Q. As a matter of practice, did you start daytime crews at 6 or 7 o'clock in the morning? A. I don't know about 6, but they started them at 7 o'clock.

Q. 8 o'clock is regular starting time, isn't it? A. That is right.

Q. If they worked from 8 until 5 that was the extent of the daylight tour, wasn't it? A. That was the extent of the straight time tour.



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*Julius Philip Bayer—For Defendants—Cross.*

Q. I mean the straight time tour. A. Yes.

Q. That was the shape that got \$1.25? A. That is right.

Q. And all other hours were called overtime hours?  
A. That is right.

Q. It was your practice, wasn't it, to start your day-time groups or crews or gangs at 8 o'clock in the morning, wasn't it? A. I wouldn't say it was the practice, no.

Q. It wasn't? A. It did occur; but there were lots of times when they worked from 7 o'clock in the morning to 7 o'clock at night.

821

Q. What was the regular practice, however, with respect to when the crews came on during the years 1943, 1944 and early 1945? A. You mean by regular practice what they had in the union or what they actually—

The Court: What was the normal thing that you did.

The Witness: Whatever they needed to get ships out. They wanted to work all the hours possible.

The Court: Who is "they"?

The Witness: The company and the men both I would say.

822

Q. Then would you say, Mr. Bayer, that there wasn't any regularity with respect to starting time and stopping time of the men? A. Well, certainly there is some degree of regularity, but I wouldn't say what was what, I couldn't say unless you go into every specific detail and list them.

Q. Then there was no general practice, was there? A. What do you mean by general practice?

Q. When I asked you before what was the regular practice, wasn't it the regular practice for men to start at 8 o'clock and work until 5 and an hour or two overtime if they were required? A. Yes, that is right.

Q. That was the regular practice, wasn't it? A. Well, I would say it was regular. You can say it is regular if



*Julius Philip Bayer—For Defendants—Cross.*

823

you want to. They come at 7 o'clock and start but I would say that—

Q. Was that the normal thing during this period 1943, 1944 and 1945?

Mr. Taylor: Was what normal?

Mr. Goldwater: To come at 7.

The Court: To come at 7 or 8. Which was the more dominant or predominant?

The Witness: I would say probably 8 o'clock was.

Q. You told Mr. Taylor that when the men worked more than 40 hours the 4 hours on Saturday morning was entered up as overtime? A. If it was above the 40 hours; yes.

824

Q. Above the 40 hours, yes. Now, back in 1939, from October 24, 1939, to October 24, 1940, the Wage and Hour Law limitation was 42 hours, wasn't it? A. Yes.

Q. How did your records show that you entered up overtime there, assuming a Saturday morning work of 4 hours after 8 hours a day for 5 days in the week? A. How do the records show?

Q. Yes. A. Well, it would be an adjustment of two hours.

825

Q. Then you would pay 42 hours at straight time? A. That is right.

Q. And the two hours at overtime? A. That is right.

Q. Now was this practice in 1939 to 1940 and since 1940 as you have described it, above 40 hours, the same in cases where men worked 5 days a week—I should say 5 nights a week, at 8, 9 or 10 hours a night and then worked a Saturday morning? A. No. They worked at night you say?

Q. Suppose they worked five nights, 8, 9 or 10 hours a night? A. At our overtime rate?

Q. At your overtime rate. That is \$1.87½ for general



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*Julius Philip Bayer—For Defendants—Cross.*

cargo. And then worked 4 hours on Saturday morning.

A. Straight time:

Q. For Saturday morning? A. That is right.

Q. And between October 24, 1939 and October 24, 1940, you would have two hours at straight time in that case on Saturday morning? A. That is right.

Q. And two hours of overtime on Saturday morning?

A. No, there wouldn't be any overtime on Saturday morning.

827

The Court: Not if he worked at night all the week before, as I understood.

Q. Let me try to make it clear. I am afraid I have not made it clear. Assuming a man works five nights at 8 hours a night, then he worked on Saturday morning 4 hours between October 24, 1939, and 1940, how would you pay the Saturday morning 4 hours? A. Straight time.

Q. Between October 24, 1939 and October 24, 1940? A. It wouldn't make any difference what time it was.

828

Mr. Taylor: Mr. Goldwater, can you tell me whether that is the date when it went from 44 to 42 or 42 to 40?

Mr. Goldwater: That is the date I am indicating, the date when the 42 hours were limited, which was October 24, 1939.

Mr. Taylor: You are asking him as to what they did where the men had worked 40 hours at night.

Mr. Goldwater: Yes.

Mr. Taylor: And no work during the day.

Mr. Goldwater: Yes.

Mr. Taylor: Then on Saturday morning he worked 4 hours, at the time when the statutory limit was 42.

Mr. Goldwater: That is right.



*Caleb A. Smith—For Defendants—Direct.*

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Mr. Taylor: You want to know how he paid the 4 hours.

Mr. Goldwater: Yes.

The Court: His answer was straight time.

The Witness: That is right.

Mr. Goldwater: That is right.

The Court: Go ahead with the next question.

Q. Would that be true where he worked 50 hours of night work in the first five nights in the week? A. It would be true no matter how—

830

Q. You would pay the same way? A. That is right.

The Court: Any other questions?

Mr. Goldwater: I think that is all.

The Court: You are excused.

(Witness excused.)

CALEB A. SMITH, called as a witness on behalf of the defendants, being duly affirmed, testified as follows:

831

Direct Examination by Mr. Taylor:

Q. Where do you live? A. I live in Belmont, Massachusetts.

Q. What do you do? A. I teach economics at Harvard University.

Q. Tell us about your education and professional training and experience, Mr. Smith, please. A. I was graduated from Haverford College with honors in economics in 1937. I worked for about a year and a half in business. Then I went to Harvard University, doing research



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*Caleb A. Smith—For Defendants—Direct.*

work and studying. After doing research work, which involved accounting and statistical manipulation of figures for about two years I started doing teaching work. The first teaching I did was in accounting. Since then I have been teaching in the fields of corporation finance, industrial organization and labor relations, as well as elementary economics.

The Court: Since when have you been teaching at Harvard?

833

The Witness: I started teaching at Harvard in 1941.

Q. What do you teach? A. I teach a course in what we call the corporation and its regulation, corporation finance and the regulation of it by such bodies as the SEC. I teach a course in industrial organization in part, that is, the public regulation of business practices under such agencies as the Antitrust Division and Federal Trade Commission. I have taught labor relations in the Harvard University Extension Courses. And teach elementary economics.

834

Q. Have you anything further that you would like to add with respect to your qualifications in statistical matters, because you know we are going to ask you about statistical evidence in this case. A. As I indicated, a good deal of the research work which I did at Harvard was of a statistical and accounting nature. I studied statistics at Harvard with Professor Crum and Professor Frickey, and participated in a seminar on statistical testing of economic data with Professor Staehle. I have published an article in criticism of statistical procedures used by Professor Yntema of the University of Chicago. The article appeared in the Review of Economic Statistics. It was a criticism of his study of the cost output function of the United States Steel Corporation



*Cabeb A. Smith—For Defendants—Direct.*

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which was presented by the Steel Corporation to the contemporary national economic committee.

Q. Have you had employment outside of your professional duties at the University in economic and statistical matters? A. Two years ago I made a study of the profitability of cotton textile firms for the—in various sections of the country for the National Association of Cotton Manufacturers in connection with a War Labor Board case.

Q. Now you have, Professor Smith, made or been connected with certain of the statistical investigations which have resulted in the compilation and preparation of certain of the tables and charts which are in evidence in this case, haven't you? A. Yes.

836

Q. Will you tell us about that, please? A. The War Shipping Administration contacted me and they asked me among other things to supervise a study with respect to the amount of overtime worked in the port of New York during the 10 months period after the Fair Labor Standards Act had gone into effect and before the war started in Europe, which rather disrupted the general pattern that had prevailed. This study pertained to the amount of overtime worked as a total to the amount worked on Sundays, holidays and Saturday afternoon to the amount of overtime worked by men who had already worked various amounts of straight time during the particular day on which they worked the overtime.

837

Q. Tell us how you went about it, how the figures were gotten together. A. The War Shipping Administration contacted the New York Shipping Association and through them stevedores in the port of New York, getting from them these figures, such figures as were described in testimony earlier this morning here. These figures were submitted. The questionnaires that we sent out requesting these figures, I participated in drawing those ques-



tionnaires up. And then after the companies had been working on those figures I went around and talked with the responsible official and in most cases with the person who had actually done the work on compiling those figures from the work sheets that were involved.

Q. Now directing your attention to the two studies which have been marked Exhibits D and E I think which is the ten months—well, let us take them one at a time; the ten-month study so-called. Now, in order that we may avoid any confusion in the record, the table which you now hold in your hand has been marked Exhibit E in the record in this case and we refer to it as the ten-months study. Now that records the figures gotten together in the manner that you have described from 17 different stevedoring companies operating in the port of New York.

I would like to have you tell the Court everything that you can bearing upon the question of whether the figures accurately derived from those 17 companies are a representative sample of the conditions here in this port during the period covered? A. It is my understanding—

Mr. Goldwater: If your Honor please, this witness has not yet been qualified to testify as to what is or is not a representative condition in this port. The witness has a fine economic background and an academic background which has been presented to us; but his experience with shipping in the port of New York is sadly absent from his qualifications. I don't think he is in a position to testify whether this is a fair sampling.

The Court: All he can do is testify whether these figures, taken as against another batch of figures, constitute a fair sample of figures. In other words, his is purely a paper proposition.

You do not claim to have any personal knowledge of conditions in the port?



*Cabeb A. Smith—For Defendants—Direct.*

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The Witness: Only in connection with talking with people in the port.

The Court: That is what I mean. Consequently, you have to qualify the paper as being a fair sample of the paper. That may lead us some place.

Mr. Goldwater: I think that is exactly what it is—a paper is a fair sample of the paper, but it is not a fair sample of the shipping conditions. It may or may not be. I don't know, if your Honor please.

842

The Court: He will tell us I presume that, making certain adjustments which will have to be established otherwise or which may have already been established otherwise, this is a fair method of getting a sample of the situation. That is what I assume the question is directed to.

Mr. Taylor: Yes.

The Court: I will let him answer it as soon as we resume after the luncheon recess.

Mr. Goldwater: I made a statement; I don't know whether it appears as an objection, your Honor, but I would like it to be understood that my statement was intended to be an objection to the witness testifying in this particular.

843

The Court: Yes, to that extent; and I overrule the objection.

(Recess to 2.15 p. m.).



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*Caleb A. Smith—For Defendants—Direct.*

## AFTERNOON SESSION.

CALEB A. SMITH, resumed the stand.

Direct Examination Resumed by Mr. Taylor:

Q. Professor Smith, won't you be good enough to tell the Court everything that you know of which will be of assistance to him in evaluating these statistical studies?

845

The Court: That is a broad invitation.

Mr. Taylor: Yes; I made it intentionally so. We are all interested, and you particularly, I am sure, in how much weight and significance you are to give them, and I am sure Professor Smith can tell us things about it which will relate to it.

Q. Won't you go ahead?

Mr. Goldwater: Of course counsel has no respect at all for the rights of opposing counsel, and the rights of the plaintiffs with respect to objections.

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The Court: I think what you will have to do is to listen, and move to strike out.

Mr. Goldwater: I suppose perhaps that is the quickest way to do it, rather than through the formality of examination.

The Court: It will be to the point, because there is a great deal the Professor knows which might be helpful, to me anyway, but I do not think we can afford to get it all into this record.

Mr. Taylor: I do not think it will take very long.

Q. Go ahead, Professor. A. With respect to the selection of these companies, Mr. Lyon of the New York



*Cabeb A. Smith—For Defendants—Direct.*

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Shipping Association told me, and as I understand it he has testified here in court, that these companies represented in his opinion companies that did at least 70 per cent of the business of stevedoring, deep sea stevedoring in the port.

The Court: All right, so that is one of the premises that you accepted?

The Witness: Yes, that and also Captain Nolan's similar assurance.

The Court: It does not make any difference from your point of view or from the point of view of this case at this moment how many people assured you. The fact is you took somebody else's statement. You took Mr. Lyon's and Mr. Nolan's statements that this was 70 per cent of the business of the port?

848

The Witness: That is correct. Then I have also examined a document prepared for this case, showing the amount of work done by all the contractors under the War Shipping Administration for the period 1944-1945.

The Court: That is the chart or table that was prepared here by another witness.

849

Mr. Taylor: Introduced through the witness Horn, Exhibit J.

Q. Go ahead. A. In that exhibit the companies which comprised<sup>o</sup> the 17 companies in this study with respect to 1939 comprised about 65 per cent of the total stevedoring business done during that period. I noted in looking over that list that the number of companies which are included in that were not in business, or were doing very little business during the period of ten months prior to the start of the war in Europe, so that that corroborates the other statements of Nolan and Lyon.



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*Caleb A. Smith—For Defendants—Direct.*

The Court: We are not interested in that.

851

The Witness: Then with respect to the companies that were not included in this sample, one expects if he has a 70 per cent sample that it is important how that sample was selected. As I understand it, they were selected to be representative of the type of work done in the port, and in talking with all of the companies which presented such material it seemed to me, from the limited knowledge of the conditions in the port that I gained from talking with some 25 stevedoring firms in the port, that they did comprise what would appear to me to be a representative sample, with the possible exception of smaller companies, that some smaller companies were left out. That is, there were some smaller companies introduced, but there were not as many smaller companies introduced as an even proportion of the port would give. The reason for that was that a lot of the smaller companies are very deficient in their clerical staff. It was hard enough to get these figures. We had to keep going back to these people and urge them to get the figures for us, and so forth, and if we had tried to get them from a lot of the smaller companies it would have made the task just that much more difficult.

852

Q. In what way, if any, does the fact that the 17 selected companies includes the larger companies, affect the significance or value of the end result? A. I would expect from the figures that were submitted by most of the smaller companies and from a rather careful search of the type of business that was done by the companies, and the remaining business to be done in the port, that the smaller companies which were not included did not handle



*Caleb A. Smith—For Defendants—Direct.*

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their proportionate share of passenger ships and other tightly scheduled ships. That would mean, then, that the amount of overtime worked by these smaller companies, as is shown in that study anyway for the companies that are there, would tend to be less than for the 17 companies' average, and also the amount of overtime worked by men who had not worked any during the day would in all probability also be less, and in the case of the smaller companies shown that is borne out.

By the Court:

854

Q. Professor Smith, you accepted Exhibit J, which is Mr. Horn's study, as the statistical basis for the number of men who worked overtime after having done daytime work, and the number of overtime men who did overtime without having done any daytime work; is that correct?

A. Only for that period.

Q. For the period involved in that study? A. In his study, yes.

Q. So that to the extent that there be any deficiency—well, any deficiency in his analysis or in his basic material, that would of course be reflected in your statistical material? A. No, when I was referring to the smaller companies I was referring to the smaller companies included in the study which I directly supervised. In the case of those the amount of overtime, particularly the amount of overtime worked by men who had not worked any during the day, was small.

855

Q. How did you ascertain in your independent study as to whether a man who had worked overtime had or had not done straight time work during the same day? A. We got the same information from the companies. In fact we got even more complete information.

Q. You mean you got the same kind of information Mr. Horn got? A. Yes.



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Q. And therefore you proceeded on the assumption that wherever there was more than four hours worked, or four hours or more, it was a new man, whereas whenever it was less than four hours additional it was a man who had already worked during the day? A. No. Our material was drawn from the sort of time sheets that were brought into question in court this morning, time sheets which—

Q. Which gave the actual identical individual? A. Yes.

857

Q. To that extent you were actually able to know whether it was the same man or another man who was doing overtime? A. Yes.

By Mr. Taylor:

858

Q. I now show you a copy of the table which has been marked as Defendants' Exhibit F, which we referred to as the 40-hour study; that is this one here. Will you tell us, please, what you had to do with that, and anything that you may want to say to his Honor bearing upon the significance of that study? Have you the question in mind with respect to that 40-hour study, Professor Smith? A. With respect to this study, after preparing this study of the amount of overtime worked under the contract, we felt in discussing it that it would be desirable to know how much overtime would be paid to the men if the contract had no overtime provisions whatsoever, and they had relied for fixing overtime simply on the Fair Labor Standards Act. My connection with this study was to lay out what material should be requested from the companies in order to prepare this, and assisted in drafting the instructions that were sent to the companies. We sent them to the same companies that had made up the ten months study, and then after getting that material back from the companies I told the statisticians at the War Shipping Administration how the material should be handled, and made up into a table.



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By the Court:

Q. Look at column 3. That you got from the invoices of the company? A. Payroll or time sheets, yes.

Q. The same kind of material that Horn had? A. No. As I understand his study, his was not drawn from the payroll.

Q. His was drawn from invoices supplied to the War Shipping Administration. A. Yes. This material was based on the company's going back to their payrolls or time sheets, and the figures in column 3 are the same as the figures in column 4 of Exhibit E, the ten months study.

860

Q. The same as column 4; yes.

Mr. Taylor: 1,760,288.

The Court: Yes, I see it.

Q. What I am curious to know is whether Exhibit E also involves the same assumption as to who is a new man and who is continuing daytime work. A. No.

Q. That was involved in Horn's analysis. A. There is no assumption. You can tell definitely, because each man had a brass check number.

Q. This is based on actual identification? A. Yes.

861

Q. So that when you see the number of men who worked more than 40 hours in any work week you actually have the identity of the citizen involved? A. Yes.

The Court: All right.

The Witness: I took that matter up with considerable care with the companies to make certain that if they carried on operations at two places that they established some method for being sure that a man, if he appeared in both payrolls, got consolidated for the purposes of this study.

The Court: All right.



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By Mr. Taylor:

863

Q. That is he would have one brass check number on one pier and another brass check number on another pier; you made sure his pay was all thrown together? In other words, speaking in broad terms, is it true that with respect to Exhibit E and Exhibit F and also with respect to the other large tabulations which we call the historical study, the information there recorded was drawn from the original payroll records and time sheets of the companies embraced within the report? A. Yes; from the payroll or time sheets we used.

864

Q. And you went right back to the original records. And it is true, is it not, that in one way or another on perhaps varying forms of documents these companies all recorded with respect to each man according to his brass check number the precise time of starting and stopping work on each day when he worked for them? A. Some of the companies, a good many of the companies did not record the exact time that he started and stopped. A good many of the companies merely recorded the number of hours of straight time and the number of hours of overtime, the number of hours that he worked on any penalty cargo. They did not record the exact time that he started and stopped in all cases. But if he worked 8 hours and it was straight time, it was the only 8 hours that he could possibly have worked. You could tell when it was.

The Court: All right.

Q. The historical study so-called which for the sake of the record I would like to get the correct designation of—

Mr. Goldwater: That is Exhibit D.



*Cabeb A. Smith—For Defendants—Direct.*

865

Q. —Exhibit D—will you tell us about that anything which would be of assistance to his Honor in evaluating it? A. This study was made from the same sort of records as the ten months study and the 40-hour study. The material was drawn by the New York Shipping Association writing to all of their members and asking them to compile this material for a three months period for each year back of 1938 for which they had the time sheets or the payroll available. A great many of the companies since the statute of limitations had run on the payrolls had destroyed them.

866

The Court: I wish I could be as sure of that as you are.

A. (Continuing) Well, that was the reason they gave me for having destroyed the payrolls perhaps I should say. Therefore, there were only a smaller number of companies who were able to furnish this material. For all the companies that could furnish this material we obtained it and collected the material together. A sufficient number of companies were able to supply that material for the years close to 1938, particularly '36 and '37. So that this study gives some assurance that the 10-month period that was selected for this study was not too dissimilar from the general picture for the recent years in the port. It also if there had been any large changes would have revealed what effect if any seemed to be caused in the pattern of port work by the inauguration of the Fair Labor Standards Act.

867

The Court: You found the relationships remained fairly constant?

The Witness: They seemed to remain quite constant. The principal thing that seemed to cause



868

*Cabeb A. Smith—For Defendants—Direct.*

variation over time was the state of general business activity. In 1937 the amount of overtime worked, probably typical, would be a little higher than in 1938. On the other hand, it was much higher in 1938 than the amount of overtime worked in 1933 and 1934.

869

870

Q. I notice that the reports are limited to three months periods. Take for example in the year 1936 where you got reports from 11, I think, different companies. No. 10 different companies. The first one designated by the symbol A-1 was reporting for the months of January, February and March, and that is true of four other companies reporting for 1936. Then the last five have different quarters. Will you explain how that happened and what bearing, if any, it has? A. We left the selection of the quarter up to the officials of the company. We asked them to select a quarter of the year that they felt was representative. In the case of companies that had material for a number of years we had them—most of them felt that the best way to do it was to take some sort of pattern. They would start out in one year and take January, February and March, the next year they would take April, May and June, and go on with that sort of pattern unless some sort of disturbance occurred, a strike or anything, that would have thrown the picture out for a particular quarter, in which case they would substitute a different quarter. The attempt was for them to pick out a representative quarter in that year.

And I talked with them about it. I asked the responsible official of each one of these companies to submit an affidavit or deposition with respect to his opinion about the representativeness of those quarters in order that I might be fully assured as to that.

Q. Will you state whether or not the studies which you



*Caleb A. Smith—For Defendants—Cross.*

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have described were prepared before or after the bringing of the suit now being tried here? A. I am not sure of the date when these suits were commenced. Is my understanding correct that it was in October of last year?

Mr. Taylor: When was it, Mr. Goldwater; do you know?

Q. The suits were brought in October 1945. A. In that case these studies were prepared almost entirely before that date.

872

The Court: They were prepared however in anticipation of litigation?

The Witness: They were prepared in connection with the prospect of litigation in connection with a case in Providence, Rhode Island.

Mr. Taylor: Your witness.

Cross Examination by Mr. Goldwater

Q. Do you understand that there were substantially the same issues involved in the case in Providence, Rhode Island, as are involved here? A. Yes.

873

Q. Now you have said that you had discussed the preparation of this data with representatives of the company on more than one occasion, as I understood your testimony? A. Yes.

Q. And did the representative of the company know the purpose for which this data was being assembled? A. Yes.

Q. That is they knew that it was being assembled in connection with the suits pending in Providence, Rhode Island? A. That is right.

Q. I would like to get clear, Professor, before I go into some more specific things just which of the studies you



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*Caleb A. Smith—For Defendants—Cross.*

directly supervised. You used that expression in connection with one of the answers that I am not entirely clear which of the studies you claim to have personally supervised. A. Why, I supervised the studies—the ten months study was the one with which I had the greatest amount, did the greatest amount of work. Exhibit E.

Q. That is what Mr. Taylor has designated as Exhibit E, that is the ten months study. A. Yes.

875

Q. All right. A. That one I had the greatest amount of connection with. With the historical study, Exhibit D, I believe—

Q. D, these two long sheets? A. Yes. With that study I had practically as close a connection as with the ten months study; a little bit less. With Exhibit F my connection was of a more general supervisory nature. I prepared or assisted in preparing the questionnaires that were sent out for Exhibit F and I directed the way in which the material should be compiled. But I did not have as quite as close a contact with the actual compilation of it. The actual compilation in all cases was done by the statistical clerks in the War Shipping Administration in Washington.

876

Q. You had no staff of your own in connection with the compilation of any of these exhibits? A. That is correct.

Q. The material that went into these exhibits. A. Any of the work that I did on it I did directly myself.

Q. Now you say that you assisted in or prepared the questionnaires that went out? A. In the case of Exhibit F I had direct participation in setting up those questions. The questions that were submitted originally, the submissions with respect to Exhibit E and with respect to Exhibit D, those questions were asked piecemeal of the companies. And some of the additional questions that were asked I directly participated in framing those questions in order that we would have adequate material on



which to base the sort of study that I wanted to make. The original questions that were asked were questionnaires and those studies were sent out prior to my connection with the study.

Q. Did you obtain copies of those before you proceeded with your work? A. Yes.

Q. Have you copies of the questionnaires? A. I have them some place in the courtroom. It may take me a while to find them.

Mr. Taylor: You have copies, Mr. Goldwater.

Mr. Goldwater: I have some copies. I don't know whether they consist of all the questionnaires that were sent out. 878

Mr. Taylor: He can very quickly show them and he can tell you.

Mr. Goldwater: I would like to know from the witness what questionnaires he participated in the preparation of and what other questionnaires he did not, but which he saw before he proceeded with his work.

Q. Would it take very long, Professor, for you to find those? A. Well, I hope not. My recollection is that some time around January of last year a questionnaire was sent out to a few companies in New York; that that was the place that this study started. 879

Q. May I ask whether the questionnaire which you now have just referred to is one that was sent out after your connection with the work? A. That was before my connection.

Q. Before your connection. All right. A. In addition to this rather jammed briefcase I have here I have two other collections of material in the back of the courtroom.

The Court: Is this question vital at this moment? I it is not maybe he can find it for you



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*Cabeb A. Smith—For Defendants—Cross.*

during the recess. You might go on with your succeeding questions.

Mr. Goldwater: I will try to go on without it, but I would like to have used it in advance of further cross-examination.

881

Q. Have you run across in looking through your papers the questionnaires that you assisted in the preparation of after your connection with the work? A. This questionnaire here (indicating) I assisted in the preparation of. This is a questionnaire, or a copy of a questionnaire—this is a carbon copy—that was sent out, my recollection is, to the companies, the last companies that were asked for all of this material in one body. You see, the first companies that were asked were asked first to submit the material simply showing the amount of overtime, the amount of the overtime that was worked on Saturday afternoons, Sundays and holidays and, hence, by whatever the amount that was worked at night. Then the breaking of that down into the amount of night overtime worked by men who had worked various amounts of straight time during the day was asked of them separately. This questionnaire here with accompanying instructions was sent out to a group of companies who were asked for all of that material at once.

882

Q. Do you mean to say then that this material was asked of different numbers of these companies at different times? That is, the same material was asked? A. That is right.

Q. First of some companies and then of other companies? A. In an attempt to get a proper and more general sample at first we had thought that perhaps about half of the port would be a representative enough sample, then it was decided to expand that sample more. There were some companies that we tried to get the information from and their records—it wasn't possible to get it there. So,



new companies were asked to supply this information in order to bring the sample up to the sort of a group that we wanted to have.

Q. You are referring now, are you, to the Exhibits D and E? A. I am referring particularly to Exhibit E. Exhibit D, although in the case of some companies where we by talking with them felt that perhaps they had not searched their records as carefully as they might, we went back to them and urged them to search more carefully to see if they could not supply this historical data. We had to pretty much accept the sayso of the companies as to whether or not they had that material available. So there was no opportunity to go back to them and get additional material very much. In the case of this ten months study where we hadn't asked all the companies in the first place, it was possible as we came to feel the need for a larger number of companies to continually go out and ask a new group of companies.

Q. That leads me to a question which was not entirely clear it seems to me in Mr. Taylor's direct examination. You were asked whether the data was not drawn from the original records and Mr. Taylor's question comprised these words, "You went right back to original records." Now, you did not have access yourself to any original records, did you, Professor Smith? A. I did not work with those records. In the case of the majority of those companies I saw the records, the work sheets under which they had transferred them, checked the accuracy in the case of entries on a particular payroll onto the sheet to see that they understood what they were doing and that they actually had the records from which they could make up such a report.

Q. In other words, you mean you made what you might call a test check? A. Yes.

Q. To see whether they were correctly understanding



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*Caleb A. Smith—For Defendants—Cross.*

what you were directing them to do? A. That is correct.

Q. As to the quarters which were selected on this Exhibit D, this large study, did you say that you left it to the companies to select the quarter which they felt was most representative? A. Yes. We did not feel that, as outsiders, we had any way of knowing what quarter was most representative for their particular stevedoring operations.

887

Q. Did you make any test check there to see whether the quarters which they selected were actually most representative of their business? A. No. I relied upon their integrity and their—as I mentioned, I asked them to make a sworn statement to the effect that they felt that this was the representative period.

Q. I ask you, Professor Smith, whether any of the instructions given, as you recall them, directed the companies to exclude loading and unloading on coastwise shipping? A. My recollection is that all coastwise shipping was directed to be excluded from these studies; yes. This was a study of deep sea longshoring.

Q. May I see the one instruction sheet which you did find?

888

Mr. Goldwater: I will attempt to proceed with something else while my associate looks this over.

The Witness: I have another questionnaire here, if you would like to see it. This is a copy of a letter sent to the Bay Ridge Operating Company. As I understand it, the material in this statistical study has not been identified by companies, with the exception of a few of the companies. I have letters here, but they contain some of the statistical material submitted earlier to a number of the companies. The Bay Ridge, as I understand it, has been identified by those letters. These letters seem to be identical with the letters sent to all of these various companies, reiterating the statistics which



they submitted in connection with the request in January or February, asking them for further statistics. I might say that one reason why the form may have been different in the case of the Jarka Company from the other companies, is that the accounting authorities of the Jarka Company were especially cooperative in helping us to prepare this material, and we had several conferences with Mr. Sellers, who is the vice-president in charge of their accounting, and, as a consequence, the instructions that were sent to the Jarka Company may have been slightly less detailed or have been compiled in a somewhat different way than those which were sent to the other companies, since we discussed them more intimately with the officials of the Jarka Corporation. I have a copy of that Jarka letter here, too.

Q. Is that the letter of February 24, 1945? A. Yes, addressed to Mr. C. B. Sellers. I would say, except for a form used by the typist, the letters seem to be the same. The break in the page, that probably was the first letter typed. She did not get the breaks in the page as nicely, I suppose, as she did after having a little practice.

Q. That is not quite so, Professor Smith; if you will look at the tabulation across the page in the letter to Sellers you will find that you have four columns. A. Yes, but in most of these letters—perhaps in that Bay Ridge one there are only three. Yes, some of the letters have three and some have four, the difference being that the fourth column is the difference between column 2 and column 3. In some cases the companies had submitted that as a separate figure; other cases they had not submitted it as a separate figure.

Q. Will you say that again, that the fourth column is the difference between 2 and 3? A. No, it is the difference between the total amount of overtime and 3. Two is the



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total amount of time. It is the difference between 1 and 2. If you subtract 2 from 1, that will give you the amount of overtime hours. If you subtract 3 from that result that will give you the amount of night overtime. That will give you 4.

Q. In other words, the sum of 3 and 4 is the difference between 1 and 2? A. That is correct.

Q. That is in the Sellers letter? A. That is correct.

893

Q. And that is not broken down in the letter addressed to the Bay Ridge, which you handed me as a sample of the instructions given? A. Yes.

894

Q. Did you issue a letter of instruction with respect to the selection of the representative three months' period, which is the material which appears in Defendants' Exhibit D? A. I do not recall having had any connection with the issuing of any instructions on that. Instructions were issued, I believe, but that was prior to my connection with this. I checked with the companies as to why they selected the three months' period involved, and, having been assured by them orally that they had selected the ones that they considered most representative in accordance with the instructions given them, whether those instructions were oral or written I do not know, and then asked them to make affidavits to that effect.

Q. You directed the studies in connection with the material which is shown on this Exhibit J? A. I am not familiar with Exhibit J.

Q. Mr. Taylor asked you about it? A. Oh, this study I did not direct, no. This was a study that was made and introduced earlier. I said that I had seen that study, that the War Shipping Administration had had that study made, and that those companies listed there are, the War Shipping Administration has told me, all of the War Shipping Administration's contractors in New York.

Q. You said also that those 17 companies comprised



*Caleb A. Smith—For Defendants—Cross.*

895

about 65 per cent of all of the business shown of these 47 companies? A. I believe between 60 and 65.

Mr. Taylor: On that chart?

The Witness: On that chart, yes.

Q. In describing this chart you said that it showed all of the work of these companies A. All of their work for the War Shipping Administration is what I meant to say.

Q. Is that so, or does it only show the work for the War Shipping Administration for the second, third and fourth quarters of 1944 and the first quarter of 1945? A. Naturally, for the period that is covered by the study.

896

Q. Now, did you say that in the preparation of these Exhibits E and F you made no assumptions? A. No assumptions with respect to what?

Q. Assumptions with respect to whether or not, for example, time worked on Saturday was after 40 hours worked in the day during the week A. It was not necessary to make any assumption with respect to that. No assumption was made with respect to Saturday time. Since you cannot distinguish from the time sheets of many of these companies, in fact most of them, whether the time was worked—at what time any overtime hours were worked—it is necessary to assume that if a man worked four hours straight time on Saturday that that was Saturday morning, and that is certain. You can be sure of that. But then the assumption comes: if he worked four hours of straight time and, in addition, worked four hours of overtime, the assumption was that that four hours of overtime was worked Saturday afternoon.

897

The Court: And not Saturday morning?

The Witness: And not before time Saturday morning? Or not Saturday evening, which is the



*Cabeb A. Smith—For Defendants—Cross.*

time, one of the most sacrosanct times of the long-shoremen to have for themselves in this port for many years.

Q. Is that the only assumption that you made? A. I think that was the only assumption that it was necessary to make.

The Court: He also postulated Euclidian mathematics.

Q. Professor Smith, assume that the companies' records, since you say they did not show the specific hours worked in many instances, showed that a man worked six hours on Saturday; what did you do with that six hours? A. It would show also what portion of those hours were straight time and overtime. If it showed four hours of straight time and two hours of overtime, we would assume that the two hours' overtime was Saturday afternoon.

Q. Would you assume that whether or not you knew the man had worked previously 40 hours of straight time during the week? A. It would also show on the records as to whether or not he had been given special compensation under the Wage and Hour Law for overtime, so that you could tell whether he was given that overtime because of having worked 40 straight time hours. You could tell that directly from the payroll record.

Q. You could tell that from the payroll record if you saw it. Did you make allowance for that in this assumption that you stated in your letter of instruction, which appears to be undated, but one of those you handed me? I call your attention to this on the second page of the three-page document, which is headed "Special Note", the second paragraph? A. Yes. This says, "It is assumed that the first four hours of overtime shown on



*Osbeb A. Smith—For Defendants—Cross.*

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the payroll records for a Saturday are from 1 p.m. to 5 p.m. Since the information asked for in No. 4, that is the total overtime for Sundays, holidays and Saturday afternoons, is overtime after 5 p.m. only, four hours should always be deducted from the number of overtime hours shown for a Saturday before making the entries in columns A, B, C, D and E."

Thus, if six hours' overtime is shown on a Saturday, it should be counted only as two. If on the company's payroll sheets it was obvious from the sheet, either because of any particular entries that there might be, that the assumption was false, they would put the material into the category where it belonged, on the basis of the entries that were there.

902

By the Court:

Q. If you had an entry showing four hours of overtime on Saturday, you treated it as Saturday afternoon work?

A. Yes.

Q. Of course, it is perfectly possible that that work might have been done in the morning, or that the man had already worked two straight hours during the week?

A. You could tell that from the records, because it would show up as his having received some overtime compensation for that.

903

Q. I say, if you have a record showing four hours paid at \$1.875, that is all it will really show? A. No, the companies did not keep their records that way. They showed overtime paid under the Wage and Hour Law separately.

By Mr. Goldwater:

Q. Did Huron show that, Professor Smith? A. It is my recollection that they did, yes.



*Cabeb A. Smith—For Defendants—Cross.*

904

Q. Did you see some of the Huron time sheets? A. I saw some of the Huron time sheets.

Q. And the payroll records? A. I do not recall that they were different.

905

Q. And you relied then entirely, did you not, on the company's own interpretation of what you meant by this assumption? The assumption did not clearly indicate what they were to do where their records showed that this overtime was due to the fact that the man had worked previously 40 hours straight in the week; isn't that so? A. I think we assumed that the officials who had charge of compiling this material had some intelligence and some integrity.

Q. I am not talking about integrity, nor am I talking about intelligence. I am talking about your instructions with respect to the preparation of the material. A. I think they could have been drawn more unequivocally, if that is what you want me to say.

906

Q. You cannot tell me now whether or not the company officials, or those who worked on these records in pursuance of these instructions, knew that they were to prepare them with respect to a proper consideration of whether or not a man had previously worked 40 hours before working the four hours on Saturday or six hours on Saturday? A. That is one of the subjects I discussed with them. In the course of discussing with them problems of that sort that would have come out. I feel sure that this had not been done in a vacuum, and done entirely from written instructions. There was a good deal of oral instructions and checking up with them.

The Court: Were there many instances where men worked 40 hours straight time and had not got Saturday morning Wage and Hour time and a half for their four hours on Saturday morning?

The Witness: Not a great deal, no?



*Cabeb A. Smith—For Defendants—Cross.*

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The Court: Would you say it was rare?

The Witness: Rather rare, yes.

Q. Suppose a man's record showed that he had worked ten hours on Saturday—

The Court: Straight or overtime pay?—

Q. Overtime pay, all overtime pay. A. The four hours would be regarded as Saturday afternoon and six hours as Saturday night. It would be extremely doubtful whether that would appear on the record, anyway.

908

Q. Extremely doubtful if what would appear? A. Ten hours of overtime on Saturday.

The Court: You mean unusual?

The Witness: Unusual.

The Court: That is because of the sacredness of the Saturday night?

The Witness: Yes, sir.

Q. Suppose the record showed eleven hours of overtime on Saturday? A. That was during the war you are having in mind now, I believe.

909

Q. I am having in mind the period which we are concerned with in this suit, which was 1943, 1944 and 1945. A. I am talking about records for the period ten months prior to the war starting in Europe, when the pressure of work in this port was very different than it was during 1944 and 1945.

Q. You spoke before of your limited knowledge of the industry in the port of New York, Professor. Had you any knowledge of the industry in the port of New York apart from the studies which you made here? A. From talking with people in making these studies, and from reading about the industry. That is my only knowledge of it.



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*Cabeb A. Smith—For Defendants—Cross.*

Q. You mean that you had no occasion to have an interest in this industry prior to your engagement in this case?  
A. That is correct.

Q. And the people to whom you had access in talking about the industry in the port of New York were whom? A. I talked with officials of the companies, with officials of the union and with officials of the employers association.

911

Q. What officials of the union did you talk with? A. I talked with one vice-president, whose name I cannot recall at the moment, and I talked with their secretary and treasurer, whose name I believe is Owens. Is that correct? He was the secretary and treasurer, I know.

Q. I am sure I cannot help you. Mr. Taylor says that is correct, as I understand it.

Mr. Taylor: Well the name is correct. I do not know whether he talked to him or not.

Mr. Goldwater: Oh, I am not asking you to vouch for the witness.

The Witness: The man purported to be Mr. Owens. His secretary introduced him as Mr. Owens.

912

Q. I think that we still have not a specific answer to the question as to how the overtime was treated when it was eleven hours, as reported by the company's records on Saturday, all overtime. A. It would be treated as four hours in the afternoon, the remainder as night overtime, if any such entry occurred.

Mr. Goldwater: I would like marked for identification the instruction sheet which the witness has handed me, and from which I have asked the last preceding questions, and from which the witness read the Special Note to which reference was made.

(Marked Plaintiffs' Exhibit 14 for Identification.)



Q. In connection with this Exhibit E, that is this ten months study, there was a breakdown here of the total number of man hours in a number of instances worked by men who already worked six hours straight time during the same day, as to overtime work, and similarly with respect to men who had worked less than six hours and more than four, and similarly with respect to men who worked less than four and more than two, and then as to the group working some but less than two straight time hours during the same day. Did you direct the breakdown into those four categories? A. My recollection is that that breakdown had been used with respect to part of the companies prior to my connection with the formulation of the question.

Q. Was it in connection with the preparation of what material, if you know? A. This material. In obtaining this material from a portion of the companies, say the first ten of the companies listed here.

Q. Did you accept this breakdown as legitimate and proper in this study? A. I accepted it, and still do, accept this breakdown as a legitimate breakdown. Otherwise I would have asked that it be changed.

Q. I would assume so. Now you did not differentiate between men who had worked eight straight hours, exactly eight straight hours, prior to their overtime work, and those who worked between six and eight hours, did you? A. That is correct.

Q. And was there a reason for that omission? A. The reason was one of facilitating the preparation of these statistics. You could scarcely ask the companies to list eight hours,  $7\frac{3}{4}$ , seven, six and one-half, six, and so on, right down the line.

Q. Obviously, but when you got to eight hours, eight hours represented what has been called here the normal work day, that is the day time work between 8 in the morning and 5 at night; isn't that so? A. Yes.

Q. You can see the contract here? A. Yes.



Q. Did you see all of the contracts running way back to 1860, or 1870? A. I have seen a number of contracts dating back, as I recall it, to the 1880s.

Q. It is many many years now since there was a clear recognition of the hours between 8 and 5? A. It does not run eight hours way back there. It was a ten-hour day.

Q. When did it begin with eight hours? A. I do not recall the exact time. I think it was about the time of the first world war.

Q. That is a great many years, anyhow. And since then it has always been described as the straight time day, hasn't it? A. As the regular working day, yes.

Q. Don't you think there is a difference between the eight hours and seven and three-quarters or six and five eighths, or five and one-half? A. There is a difference, but the difference is not a crucial difference such as the difference between a man having worked two hours of straight time and not having worked any at all. We did not feel that it was justifiable to ask for that separately, because the difference between not having worked any during the regular day and working some during the regular day indicated the difference between a man being hired to start out handling a boat probably that had come into the port but had not docked until late in the afternoon, and then continuing to work that boat in the evening, whereas this business of working seven and a half hours or seven hours would probably arise from a situation in which either the boat docked a little too late for him to start at 8 o'clock in the morning, or that a thunderstorm came up and they had to knock off work for an hour or two during the day, or some cause of that sort interrupting the work. The man was undoubtedly employed at the shape at 8 o'clock in the morning. That was the only time he would have been available for employment. He was available for employment for the whole day if he had worked six to eight hours, and for all practical purposes—as a matter of fact, that might have



thrown the whole four to eight hours together, without any real damage being done to these statistics.

The Court: What was the significance of breaking down 2 to 4, 4 to 6 and 6 to 8? Why not simply have the two classifications, those who worked during the straight time and then overtime, and those who did not?

The Witness: That would fail to show when a man had only worked half a day. If a man worked half a day, say he was hired at the noon shape, if he was hired then it is a different situation than if he is hired at the morning shape. I think that we might well have had consolidated columns 12 and 15, showing 6 to 8 and 4 to 6, and also columns 18 to 21, none to 2 and 2 to 4, or perhaps it should read "some" to 2 rather than "none to 2". Since that breakdown had already been asked of me I did not see any reason for throwing two together.

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Q. Did I understand you to say that you did not ask for the eight hour work and overtime, specifically eight hours and overtime, because there had to be the limitation of the amount of material that you could ask the people to get out? A. Yes.

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Q. Did you actually consider the request for those who worked eight hours? A. Exactly.

Q. And then exclude it? A. As I explained before, this form had been sent out to some of the people already. I did not see when I came into the study any reason for requesting a new classification being made there. Any advantage that there might have been in having the exact eight hours did not seem to be great enough to warrant the very considerable amount of work involved in making that new breakdown. It would have involved going back over the sheets entirely again.



Q. Am I to conclude, from the last portion of your answer that you did consider it and exclude it? A. It was something like a year or a year and a quarter ago, and I do not remember exactly my thought process when I looked over those classifications. It certainly would have been one of the things that would have been likely to have occurred today. If I would have considered it now I should not consider it necessary to ask for that additional information.

Q. Is the best you can say now, Professor, that you cannot remember whether you considered that a year and a half ago or not? A. That is right.

Q. Now, Professor Smith, you say that a large amount of this material had been gathered before you were engaged in connection with these studies; is that right? A. Yes, or was in the process of being gathered, the questionnaires having been sent out.

Q. Now were companies added after you came in or was it a matter of only asking for more material from the same companies? A. Both. Both more material was asked for and companies were added. Primarily, companies were added.

Q. Will you tell us what in statistical work is understood by the term "frequency distribution"? A. Well, in a frequency distribution you take the number of individuals in the universe, as we call it, all the ones that exist. You have drawn from the universe a number of different, separate individual cases, then you arrange them according to a classification, whatever the particular statistical quantity that you are concerned with, and you break them down into various groups. Say that you want to find a frequency distribution of the number of hours worked by men during straight time. You would note down all the number of men who worked a period of any particular length that you wanted to make it, say 6 to 8 hours; you would note down all the men who were in that particular category. Then



you would take the number of men who were in the category for the 6 hours and so on. That is the way you make up a frequency.

The Court: How would the result be phrased? In what type of a figure? A chart, or graph?

The Witness: You would make up a chart showing the number of instances that fall in each one of the classes. Sometimes you make them up, instead of for classes, for individual items. For instance, since I know of no company that breaks it down into less than quarter hours, if I remember rightly the contract provides that the quarter hour is the unit; you could make up a frequency distribution showing the number of men who worked 8 hours,  $7\frac{3}{4}$ , 7 and so on, not for ranges but for just individual items.

Q. Would you call a frequency distribution of the studies which you made a chart which showed the number of hours worked daily by the employees whose hours were covered?

The Court: Or groups?

A. I don't get your question, I am afraid.

Q. I want to know whether you would call an appropriate frequency distribution here a chart showing the number of hours which were worked daily by all the employees whose hours are covered? A. It would be a frequency distribution. I am not sure what purpose it would serve.

Q. You don't think that would serve any useful purpose here in the study? A. It doesn't occur to me any way it could be used at the moment.

Q. It would show you the number of hours worked on an average by all employees within a given period for all of these companies, wouldn't it? A. It would show you more than that.



928

*Caleb A. Smith—For Defendants—Cross.*

Q. What more would it show you? A. It would show you the number of men who worked in excess of any particular amount of time that you wanted to know about. If it showed, for instance, the number of men who had worked nine hours or ten hours it would just show you that right off.

Q. It would show that. But one specific thing it would show and that is the number of hours, average hours worked by all the men covered by your studies here, wouldn't it?

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The Court: Do you mean by aggregating the individuals and aggregating all the hours and dividing one by the other?

Mr. Goldwater: Yes.

The Witness: Yes. That is what we call a measure of the central tendency of that distribution.

930

Q. I don't recognize that term, Professor, but I accept it. You did not think that was important or of interest in connection with this study? A. It does not seem to me that a figure on the average number of hours worked by the man in this study would be of any particular significance when you have so much more detailed information about these men.

By the Court:

Q. If one man worked 16 hours and another man worked one hour the average time that they would work—or, say the other man worked two hours, to make it easier, you would have the average time worked of nine hours? A. That is correct.

Q. But neither of those men worked nine hours? A. That is right.



*Cabeb A. Smith—For Defendants—Cross.*

931

Q. If you extend that generally you could have an average figure which applied to nobody? A. That is correct.

Q. Would it give you a distorted picture of the industry if you reported that the average work time was nine hours when in fact half worked 16 hours and the other half worked two hours? A. Yes, very decidedly.

Q. Averages are not useful for this type of study, are they? A. They are not as useful as breakdowns such as were prepared here. It would have been very simple to get the new—

932

Q. Would the median be any more useful? A. I don't believe that a median would be especially useful here. A median is particularly useful when you have one or two very extreme items. For instance, the average wealth of the people in this courtroom would be a certain amount. If Henry Ford were to walk in the average would go up very sharply. The median would remain the same.

By Mr. Goldwater:

Q. I refer you now to your Exhibit E, Professor. Your first of the two columns under the heading 17 shows a figure 11.82 for the total of 17 companies. Now will you tell me what that represents? A. That represents the percentage of overtime work done at night on weekdays, performed by men who had already worked between six and four hours of straight time during the day upon which they performed that night overtime.

933

By the Court:

Q. Is that 11.82 a weighted average? A. That is a weighted average, yes.

Q. The larger companies had a greater weight than that.



934

*Cabeb A. Smith—For Defendants—Cross.*

of the smaller ones? A. That is right. It is obtained by dividing the whole figure for the man hours there in column 15, 149,000, by the figure 1,261,000 over in column 9.

By Mr. Goldwater:

Q. Now in Column 20, the heading 20, the first of the two columns shows a total for the 17 companies of 6.49.

A. Yes.

935

Q. That is a similar percentage? A. That is a similar percentage for those men who had worked between 4 and 2 straight time hours.

Q. And under the heading 23, the first column has for the total of 17 companies 59/100 of 1 per cent? A. That is right. That is the percentage of their night overtime that was worked by the men who had already worked some time but less than two hours.

Q. Under the heading in 26 you have a figure in the total column of 23.29 per cent? A. That is right.

936

Q. And that represents what? A. That represents the proportion of the night overtime worked on week days, performed by men who had not worked any straight time during the day. That is to be contrasted with the figure in column 25 of 4.17 per cent, which is the figure showing the proportion of all of the work done in the port, or done by these 17 companies during this period, that the work done by men who had done no work during the day is.

Q. Now the total of these four groups, the percentages represented in these four groups that you have described, the 6 to 4, 4 to 2, 2 to zero and no work during straight hour time is, as I add them, 42.19 per cent. Can you tell us quickly whether that is approximately right? A. This is the total, starting with 4 to 2?

Q. That is right. 6 to 4—starting with 6 to 4; 11.82, 6.49, 59/100? A. It is about 42 per cent.



Q. 42.19! A. Yes, that seems to be right.

Q. Did you learn, either actually or approximately, how many hours were employed by these men who were included in 12 who worked 6 to 8, who worked six hours, seven hours and eight hours? A. It is the same percentage figure for that. It was 10 per cent of the total night overtime.

Q. That was the total for all who worked six, seven and eight; is that right? A. Yes.

Q. Do you know what proportion of them worked six and what proportion seven and what proportion eight? A. I haven't the slightest idea. I would assume that a considerable portion of them worked eight hours. The payroll sheets that I looked at very frequently, came up with the entry 8 and 2, or 8 and 3, or some such entry as that.

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Q. You are relying purely on your recollection as to those payroll sheets now; you have no figures? A. I have no figures.

Q. You have no work sheets that would indicate that? A. I have no figures, no work sheets that would indicate that. It is merely that my recollection of those payroll sheets is that an entry for a man working seven, seven and a half, six and a half or six hours was much less frequent than an entry for a man working eight hours straight time.

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Q. But you can't tell us how much less frequent it was? A. My recollection would be that the number working eight hours would outweigh all of the ones working seven and three-quarters, seven and a half and so on, down to six.

Q. And the total of those was 10 per cent? A. Yes.

Q. 10.34. A. That is of the night overtime.

Q. Yes. A. No, wait a minute. Excuse me. That 10.34 is the percentage of overtime hours worked by the men



940      *Cabeb A. Smith—For Defendants—Cross.*

who had already worked six to eight hours as against the total amount of work done in the port. It is 57.8 per cent, the figure in column 14 there that is the figure that is comparable to the one we have been discussing for the other periods.

The Court: The 42 per cent?

The Witness: Yes.

The Court: Which complements it to make it about 100 per cent?

941      The Witness: To make it 100, yes. That 42.19 and 57.81 make just 100. I think my testimony in reply to a question or two back, perhaps gave an erroneous impression on that. I was looking at the wrong column.

Q. Now taking Defendants' Exhibit F, that is this year study, can you determine from that exhibit the average number of hours worked per week per man during the period covered? A. I believe so.

942      Q. How would you determine it? A. Column 1 gives you the total number of man hours worked. Column 2 gives you the total number of men employed. Excuse me; you couldn't do it from this. It would be possible to determine it from the raw statistics which we have, because we asked for these statistics on the basis of week by week. We asked for them week by week in order to be certain that they did not get things confused. But it would serve the purpose of being able to figure out an average number of hours worked if you wanted to.

Q. Then from the basic material you could have determined it, but you can't from this; is that it? A. You could make a pretty close guess, but you couldn't actually determine it, I believe, from these figures. I don't off-hand see any way of doing it. If you examine the statis-



*Cabeb A. Smith—For Defendants—Cross.*

943

ties long enough you can work out some manipulation that will produce—give you the answer that you want.

The Court: We are not going to wait that long.

Mr. Taylor: You mean the answer Mr. Goldwater wants.

Mr. Goldwater: No. The answer that the statistician would like to give.

The Witness: No. By the term "manipulation" the statistician means that you have a couple of things that are divided, say, and then again you have one of those items, and you recognize upon examination that if you divide—you take one result and multiply the thing that has been divided into it previously and you will get the original figure back that may be the thing we are looking at at the moment.

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Q. Look at column 2 on Exhibit F. The heading is the total number of men employed. The total is 367,271. You don't mean to show by this that there were actually 367,271 different men employed, do you, different individuals, separate individuals? A. Yes. Your question refreshes my memory. That figure would show. A man would appear there once for each week that he worked, therefore you could divide column 1 by column 2 and get the result that you wanted to get.

945

Q. You see, Professor, one of my associates here understood what you meant by "manipulation". I would like to see whether this process of manipulation would develop what I am told to be the fact; that is that the average work week was about 22 hours a week. A. This would show it somewhat lower.

Q. I would like to have you confirm it; if it is lower I would like to have you— A. This figure is somewhat lower than the 20 hours.



946

*Caleb A. Smith—For Defendants—Cross.*

Q. About 19? A. I thin' it would be about 19; yes.

The Court: You are now dividing one by 2; is that what you are doing?

The Witness: Actually, the other way around, 2 by 1.

The Court: How do you divide a small figure by a bigger figure and get a whole number?

The Witness: You get a decimal fraction, and then you move the decimal point over two places, because it is percent. By the nature—

947

The Court: What I thought he wanted—

The Witness: He wants hours. Excuse me. Then you divide 2 by 1.

The Court: 1 by 2 you mean?

The Witness: Divide 1 by 2, that is right. Excuse me.

Q. I notice that at the bottom of your Exhibit E, Professor, you had certain notes, three notes? A. Yes.

Q. Those do not appear on F, do they? A. Well, they should. They apply as far as F is concerned.

948 Q. They do apply? In other words, in the case of Bay Ridge, and we are told the figures are for two months only, that would apply with respect to Defendants' Exhibit F as well as E, would it not? A. Yes.

Q. Didn't you think that was important, to show that on this exhibit? A. It certainly should have been shown on the exhibit.

Q. You knew that Bay Ridge was one of the defendants here, didn't you? A. Not at the time this was drawn up.

Q. You did not know that? A. Because I didn't know who the defendants were in this case until just about a month ago.

Q. Well, you will admit that if a company was a sub-



stantial user of man hours as Bay Ridge is here and appeared for only two months in a year's study, it was important to show that? A. Well, the intimate relation of these two studies I think should guard somewhat against the oversight in not having put those notes on. The two studies were designed to be used together as a contrast to each other, and all the figures appear on their surface to be the same for the same items.

Q. Well you never know, do you, Professor, when you prepare studies, how much is going to be used and how much is not going to be used? A. No, I do not.

Q. Isn't it a proper protection or precaution to put on proper reference notes to all portions of the study? A. It would have been advisable to have them included certainly.

Mr. Goldwater: All right, Professor; thank you very much.

Mr. Taylor: There is one matter that I wanted to inquire of Professor Smith, that should have been in his direct examination. I would like, your Honor, to finish it.

The Court: All right.

Re-direct Examination by Mr. Taylor:

Q. Professor Smith, did you at the request of the War Shipping Administration make an investigation and study to determine what would be the impact on the stevedoring industry in the United States of a court decision or an Administrative determination that in that industry the legal way of computing pay of longshoremen under the kind of collective bargaining agreement we have here would be to divide the total weekly pay by the total hours worked and call the quotient the regular



952 *Cabeb A. Smith—For Defendants—Re-direct.*

rate of pay, apply that to 40 hours, and time and a half that amount for the hours worked in excess of 40½

Mr. Goldwater: I object to that as entirely immaterial and irrelevant to the issues.

The Court: Now, Mr. Taylor, you will have to show me authority for justifying that question before I will allow him to answer it, even under Rule 43.

953 Mr. Taylor: If your Honor please, the only reason I press it is this. We have here a statute which uses very broad, general language. We are justified, within reasonable limits, in assuming that Congress at the time it adopted that language had that degree of knowledge of generally accepted and prevailing conditions in organized industry in the United States which have existed for a long period of time. They of course also knew that conditions would vary from one industry to another in detail. You have home workers, you have the embroidery workers, you have people—

954 The Court: I understood that the Circuit Court sustained a decision which I had a little to do with in which they practically abolished an industry.

Mr. Taylor: Yes. I perhaps prompted it by my reference to it.

The Court: Ergo, it should follow that the mere fact that there is going to be a sharp impact should not have a very great deal to do with the decision.

Mr. Taylor: We are concerned here with the longshore industry. Your Honor has got to decide what the words "regular rate" mean as applied to this industry. And I suggest that it is not unreasonable to urge upon you that a construction



which would ruin the industry is a construction which the Court should not take unless compelled unavoidably to do so. What does the word mean in this industry? It ought to have a reasonable meaning in this industry.

The Court: The trouble is that what would ruin an industry is one of those things that is a little difficult to determine. I have heard the words "ruin an industry" many times over the last 25 years. Somehow or other some of them don't ruin quite so easily. Their virtue seems to be a little stronger than that.

Mr. Taylor: Yes.

The Court: What you mean really is that it is going to cost a lot of money. Of course I can figure that out very simply myself. If you mean, further, that, assuming nothing else changed, the industry might go into bankruptcy, of course the answer is it never does remain quite the same. Or you may mean that stevedore rates will go up, maybe shipping rates will go up, maybe the postal rates will go up, I don't know. Maybe the dollar will be devalued.

But I think this appeal to impending disaster barring language in a statute which would indicate that that is one of the factors to be taken into consideration, I should think would be inadmissible. I am not aware of anything in this statute which suggests to the Court that the economic consequence to the employer should be given the slightest attention. I am rather impressed with the decisions which indicate that economic consequences to the employer are of no concern, or at least are of concern only to this extent, that the Congress has made a finding that this law will ben-



*Colloquy.*

958

effit industry, a finding which the Courts of course are bound to accept. So that the fact that in Case A or Case B any increase will prove very serious, I should not think it material, and I am so persuaded that it is not that I do not even want to let it in under 43.

Mr. Taylor: Well, I would of-course not urge upon your Honor that the mere inability of a defendant accused of an illegal act has anything to do with the question of his liability.

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The Court: No. I understand you are addressing it to Congressional construction.

Mr. Taylor: Yes, I am. And in spite of whatever has been said in the cases which your Honor has in mind, I still with very real sincerity urge upon you that when the courts come, as they inevitably will, from one industry to another, that we should not be too easy to cast aside the accepted practice in an industry. If you have one of these things which has been rigged by a smart lawyer—

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The Court: That is a matter of argument, which is perfectly proper, and I haven't any objection to listening to counsel arguing on such propositions. But when you want to introduce evidence, presumably the purport of which will be that this will constitute a burden so great upon this industry that it will languish and die under its assault—well, let us assume that the evidence would thus show. Would that affect the judgment of a court in reading this Congressional language?

Mr. Taylor: Yes.

The Court: Maybe that is what Congress intended, to abolish the longshore industry.

Mr. Taylor: You seriously can't think that.



The Court: I was told I could not seriously encounter that in connection with the embroidery industry, and the court sustained that view, that that is about what Congress did intend.

Mr. Goldwater: And they did not languish and die.

Mr. Taylor: There were considerations in that case, as I recall it, which were of a practical nature. I mean, the inability to supervise and police the thing otherwise was a very strong reason for that decision. There are no considerations of that character involved here.

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The Court: Maybe the longshore industry—I am now speaking *ex cathedra*—maybe Congress meant that the longshore industry should be reorganized completely on an orderly basis. I don't know. The mere fact that this is going to be very costly, and that is what your argument will add up to, so costly that the earnings of the stevedoring companies will not be able to absorb such costs—that is what you are going to prove, isn't it?

Mr. Taylor: Yes.

The Court: Well that I think is clearly inadmissible.

963

Mr. Taylor: For the sake of protecting my rights on the record, do I need make a formal offer of proof, or ask you to receive Professor Smith's testimony as an offer of proof, or can it be done on the assumption that my testimony would be as just stated by your Honor?

The Court: I understand that you are offering to prove through your offering evidence to the effect that victory here for the plaintiffs would, if applied generally to the industry, constitute a burden so



*Colloquy.*

964

great that the present operating revenues of the stevedoring companies would not be able to absorb it.

Mr. Taylor: Yes. And even more than that—

The Court: I don't say that you have proved it. I say that is what you are offering to prove.

Mr. Taylor: Yes.

Mr. Goldwater: The witness is shaking his head, your Honor, and I think you should observe it, because he indicates negatively that he would not so testify. I don't know what he means.

965

The Court: An offer of proof is never evidence. I say that is what Mr. Taylor is offering to prove. You offer an objection to that?

Mr. Goldwater: I certainly offer an objection.

The Court: I sustain that objection.

Mr. Taylor: May I enlarge a little bit on this record now what constitutes my offer of proof, to say this: That the subject which I would ask Professor Smith about if permitted to say so, starting with—

The Court: Is it in writing?

Mr. Taylor: It is partly in writing, and in the form of a statistical chart.

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The Court: Why don't you have it marked for identification?

Mr. Taylor: The chart would be meaningless without some additional testimony. The result of his investigation, if I correctly understand it, would show that the result of the application of the method of pay calculation which I refer to, that is the average, would result in an increase in the tables of somewhere between 6 and 10 per cent. And we are prepared to show the existing relationship in the industry generally between the total amounts of money which they have paid out for longshore wages during the period 1939 to 1944 and applying to those figures a percentage increase of from 6 to 10 per cent.



would know how much the liability would be in judgments brought within the statutory period and established on the—

The Court: Retroactively now you are speaking of?

Mr. Taylor: Yes. And the study also includes a tabulation of the net worth of the various companies at the end of 1944, the end of the same period covered by the total payrolls, longshore payrolls.

So that as the material is arranged in this chart, by putting a straight edge across at any particular percentage of the increase you can show how many companies would have against them judgments equal to their entire net worth.

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That is what the study is. As to the prospective operation and these horrendous consequences your Honor intimated I was going to undertake to prove, I do not want any misimpression about it. I am not prepared with that sort of testimony. The testimony is only of the kind I have described to your Honor.

The Court: I think—I take it the objection still persists, and my ruling still stands. If you want to offer the table to be marked for identification you may do so, so that a reviewing court might be able to look at it if it chose, to see how grievously I may be in error.

969

(Marked Defendants' Exhibit K for Identification.)

Mr. Taylor: Mrs. Schleifer asked me whether I should not make an offer of proof. My understanding is that what I have said is being taken as an offer of proof.

The Court: That is correct.

(Witness excused.)



970

*Philip Taft—For Defendants—Direct.*

PHILIP TAFT, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination by Mr. Taylor:

Q. Where is your home, Professor Taft? A. Providence, Rhode Island.

Q. What is your profession? A. I am a teacher at Brown University.

971

Q. Will you tell the Court about your education and experience and qualifications. A. I received my doctor's degree from the University of Wisconsin. I was on the staff of that university. I was employed by the Wisconsin Industrial Commission, by the Social Security Board, and for the last nine years I have been teaching at Brown University. I have also worked for the War Labor Board, and have done some private arbitration.

The Court: What are you teaching?

The Witness: I teach labor economics and social security, although I also teach general economics, but I regard my field of interest the various aspects of labor.

972

Q. Have you published articles in that field, Professor Taft, articles or books? A. Yes.

Q. Tell us about that. A. I am co-author of the "History of Labor of the United States", with Prof. Selig Perlman, covering a period from 1896 to 1932. It is in the "History of Labor" series, edited by Prof. John R. Commons. I am the author of a general labor textbook called "Economics and Problems of Labor." I am co-author in the "Studies of Collective Bargaining", published by the 20th Century Fund. I have also published articles in the American Economic Review, the Quarterly Journal of Economics, the Journal of Political Economy and the Jour-



*Philip Taft—For Defendants—Direct.*

973

nal of the American Statistical Association and the Political Science Quarterly. Also I have written reviews for The Nation and the Herald-Tribune.

Q. Have you served as arbitrator or otherwise in labor matters? A. Yes, sir; I was a public panel member for the New England Regional War Labor Board, and I was chairman of the Trucking Panel up there, and I have done some private arbitration. I am the permanent arbitrator under the New England Transportation Company contract with the Amalgamated Association of Street and Electric Employees.

Q. Did the word "overtime", Professor Taft, have a generally accepted meaning in American industry prior to the Fair Labor Standards Act? A. Yes.

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Mr. Goldwater: I would like to object, because the suit here is under a statute. The word does not appear in the statute. Whether or not the word had a particular meaning in American industry has no relevancy or materiality here. Specifically, it has no relevance or materiality under the contracts which are in evidence here, as appears from the reading of the contracts and the indiscriminate use of it. It has relevance, according to the testimony of witnesses, in the industry, and the only testimony before your Honor is to the effect that it is used to indicate the difference between the hours 8 a. m. and 5 p. m., and working after those hours, or working meal hours, or working Sundays or holidays or Saturday afternoon and at night.

975

The Court: I see no prejudice in the question. I will allow it.

Mr. Goldwater: I move to strike out the answer, since the witness answered before I had an opportunity to object.

The Court: Motion denied.



976

*Philip Taft—For Defendants—Direct.*

Q. What is the meaning of the term as used in industry generally throughout the United States prior to the Fair Labor Standards Act?

Mr. Goldwater: I renew the objection on the same grounds with respect to the basic question.

The Court: I make the same disposition.

977

A. The word "overtime" has been both to describe excess time, time to which a penalty was applied, a penalty rate of payment, the purpose being to discourage work at those particular periods.

Q. Was there any distinction in thinking as between hours worked after a preceding period of work and hours worked in one part of the day as distinguished from being worked in another part of the day?

Mr. Goldwater: That is objectionable upon the same grounds, particularly in view of the testimony of previous witnesses as to the practice from time immemorial.

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The Court: Objection sustained, because I do not think the question is clear. Let me see if I can frame a question, and if you want to object to it you may.

Is the word "excess time" that you used, was the idea of excessivity an essential element of overtime prior to the Fair Labor Standards Act?

The Witness: No, sir.

Mr. Goldwater: I object.

The Court: Objection overruled.

The Witness: No, sir; overtime, the concept as it appears in American industry, or the practice, I may say, is really made up of two specific ideas, one arising in excess of a particular sequence, and the other may be a specific enumeration of hours.



*Philip Taft—For Defendants—Direct.*

979

Originally, overtime was regarded as hours in excess of ten or even in excess of 12, or specific hours may be enumerated in a contract of employment.

By the Court:

Q. Let me see if I can understand it. Do I understand that you say that the term "overtime" as commonly used in American industry before October, 1938, meant one of two things: one, it meant time in excess of a stipulated period, or it meant any time, whether in excess or not in excess, which was penalized in any shape or form in the method of payment? A. The two concepts were usually joined together. In other words, you would find—or may I say frequently be joined together. You might find that the overtime provisions were defined as hours in excess only. Then you may find, again, that the overtime was defined as hours in excess and also as applicable to specific hours.

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Q. Did you ever have the second without the first? A. I do not recall it, sir.

Q. So that excessivity was always an element of the overtime? A. Only in the sense that the definition was there. A man could go to work, can go to work now under many contracts in the construction industry or in the printing industry, start at a particular hour and be paid overtime rates, irrespective of whether he had worked—

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Q. Any prior time? A. Yes.

By Mr. Taylor:

Q. What was the purpose of overtime? A. The purpose of overtime is to prevent employment either at a given period or beyond a given number of hours. It is an attempt to impose economic sanctions, or an economic pen-



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alty upon the employer, so as to discourage him from continuing work at either certain periods or after a certain number of hours have been worked.

Q. What is the history of the development of that concept, and how did it come to be accepted, as you say it was accepted?

Mr. Goldwater: I would like to object again, on the grounds which I stated in my objection to the basic question.

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The Court: I do not see any prejudice. This might be instructive. I will allow it.

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A. Well, the demand for shorter hours by organized labor is one of the first demands that have appeared in our industrial history. Early in the 19th century, and even at the end of the 18th, when labor first organized, the demand for the reduction of hours made its appearance, and several justifications were developed, and those have been, with changes to suit the different times, have been used throughout our history. First it was customary to work very long hours in industry, 12 and 14 hours a day, and we have what is called the citizenship argument, the demand that a free citizen must have leisure time so as to be able to exercise his franchise intelligently. You then have the development of the idea that a reduction in hours will lead to better productivity. Then you have the development of the idea that a reduction of hours is needed to eliminate or to minimize different types of unemployment, maybe technological unemployment. Always the emphasis has been throughout American labor history, I mean throughout our industrial or national history, because unions appeared quite early, the reduction of hours. Thus we had the demands for the ten-hour day, the demands for the nine, for the eight, for the 40-hour week, or rather half Saturday holidays—40-hour week, and now



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we even find demands for lower weekly hours than 40 in many industries, in the mining industry, in the clothing industry and others—always limit the hours of labor, reduce them and reduce the hours and allow others to work; but impose a penalty that will discourage work beyond the standard or scheduled hours; and this idea has motivated largely through the feeling, rightly or wrongly—economists would not accept it as correct, but, nevertheless, it has been a driving force throughout our history, that the amount of work is limited, and that some means was necessary to share the work among as large a number of workers as possible.

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Q. Without going into too much detail, can you tell us, with perhaps illustrations, how extensive the recognition and use of this concept was in this country at a time shortly before the adoption of the Fair Labor Standards Act? A. Well, it was fairly general. In labor contracts you will find not only penalty rates, but in some cases absolutely prohibitions, or if you wish to continue beyond the scheduled hours you must get permission for every specific instance. The idea of limiting the work week is one that was prevalent throughout virtually all of our industry, and it is especially evident in those industries that have organized and were operating under a union contract, because the unions have been able to impose their collective bargaining, through collective bargaining, some limitation of the hours of labor, and have led the way in this respect throughout our history. I could cite examples in the study I made at the request of the War Shipping Administration. I have found—well, about 30 examples where not only the hours of labor were limited, but also where specific hours were enumerated as overtime hours, in the report of the Industrial Commission, the hearings which were held at the turn of the century and in the examination of labor contracts. I found the same

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thing repeated, not as frequently, as an absolute limitation of the number of hours, but with sufficient frequency to establish that that idea of overtime existed.

Q. What was the usual overtime rate? A. The usual overtime rate is—

Mr. Golwater: I object to the question. It seems to me that usual overtime rate—

The Court: Objection sustained. You do not have to argue it. You are now getting into dollars and cents in ratios.

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Mr. Taylor: No, sir.

The Court: We will listen to the evidence that there has been a penalty provision, but I think the precise amount of it perhaps exceeds the limits. If you want to indicate those that is as far as I will let you go.

Mr. Taylor: I think the amounts are important, sir. Let me ask a preliminary question.

Q. Can you say from your studies and your knowledge in this field, whether or not there is a generally accepted relationship or probably prevailing relationship between  
990 straight time rates and overtime rates?

The Court: Before the Wage and Hour Act?

Mr. Taylor: Yes, sir.

Mr. Goldwater: I object to that as immaterial and irrelevant.

The Court: I will allow it.

A. Yes, sir.

Q. What was it? A. The usual amount is time and a half, though in the older organized industries, and by the older organized industries I mean mainly the printing trades and the building trades, you have time and a half for the



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first two or maybe for the first four, and then double time. In other words, an added penalty is imposed if the first penalty is not sufficient to discourage it. Anyone who wants to go beyond a limited amount of overtime will have to pay an added penalty. But that I think is limited to the older organized trades, but time and a half is quite generally in use and certainly in virtually all organized trades.

Q. Can you name a number of industries that occur to you quickly, in which overtime is required to be paid when work is done outside of the normal or usual hours, working hours, of the day? A. Yes; the building trades fairly generally, the printing trades, some of the metal trades, and, may I say, that in the arguments as a panel member of the War Labor Board that this question was always one of contention between the unions and the employer, with the unions—

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Mr. Goldwater: Just a moment. What was a matter of contention with the War Labor Board panels is not material.

The Court: No, it is not responsive to the question.

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Q. What I wanted you to do was just to name a variety of industries in which this situation exists. A. The building trades, the printing trades, some of the metal trades, and, of course, the longshore industry.

Q. Any others you can remember? A. Not right now. If I consult my notes I believe I could find others, but those fairly generally and over a long period of time.

Q. Did you say a few moments ago there were some 30 of that character that you knew of? Yes, mainly in the building and printing trades, specific contracts. I have reference to specific contracts rather than industries.

Q. What is the shift differential?



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Mr. Goldwater: I make the same objection as I made to the previous questions.

The Court: I will allow it.

A. A shift differential is a payment for work on either the second or third shift in a plant or an industry where more than one shift is worked.

Q. What is the difference between a shift differential and true overtime?

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Mr. Goldwater: Same objection.

The Court: Overruled.

Mr. Goldwater: Exception.

A. A shift differential would be an amount large enough to attract the worker for working at less desirable hours, and yet not inhibit work, whereas an overtime work would be a rate designed to inhibit work at the hours mentioned, or after a given number of hours; and I think it can be recognized by the relationship between the amount paid on the second and third shifts to the amount paid on the first shift. You can recognize whether it is a shift differential or whether it is an overtime rate.

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Q. Amplify that a little bit. A. A shift differential is usually a 5 per cent hourly rate, or up to 10 per cent, 5 cents or 10 cents, in some cases a 15-cent difference. There is a considerable variation. Seldom would it be more than about 10 cents an hour, or 5 to 10 cents an hour difference between the first and second shifts, and 5, 10 or 15 cents difference between the first and the third shift.

Q. Do you know of any shift differentials as high as 50 per cent? A. I do not.

Q. What is the highest you ever heard of for a shift differential?

Mr. Goldwater: Objected to as immaterial.



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The Court: I will allow it.

Mr. Goldwater: Exception.

A. The only one that I have known above the amounts that I have enumerated, either 5 per cent or 10 per cent, or 5 to 15 cents, was in the lumber industry, and there a special situation existed. It was due to the difficulty of getting workers in the Pacific Coast lumber industry as a result of the competition of the shipyards and the airplane plants.

The Court: That was during the war?

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The Witness: Yes.

The Court: What was the shift differential then?

The Witness: 25 per cent.

Q. Do technological considerations and also the volume of business which a particular employer may want to do have anything to do with whether he sets up shifts on a differential basis, as distinguished from whether he has straight time overtime? A. Yes, most of the shift problems have come into existence during the periods of the two wars, and many plants have had to recruit people, that is plants that usually operate on single shifts.

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Q. Before we get into the war situation, I wish you would answer my question with reference to normal peacetime operations in this country. A. Will you repeat your question, please?

Q. Yes. What I am now asking you has to do with peacetime for the moment, not with war time. Now then, in peacetime what effect, whether you have shift differentials or not, do the economical situations and the volume of business of the particular employer have? A. An employer operating on two shifts is able to spread his overhead over a larger number of units, and therefore he is



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enabled to pay his employees a slightly higher rate on the second shift, because of the advantages that a larger volume gives to him, whereas if he is operating overtime that does not take place, the overtime which is too high an amount and that is its purpose. Its purpose is to inhibit him, except under emergency conditions or unusual conditions, from working at those particular times.

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Q. Put it this way: in all of your studies do you know of any instance where they have a true shift differential, where it is not necessary to work around the clock or in shifts, either for technological reasons or because of the volume of business with reference to the size of the plant?

A. No, sir; no, of course not. Shifts will either be worked in continual process industries, or in industries whose orders are over a period of time and are large enough to employ a second and third shift. Otherwise there would be no point in working and recruiting and training and organizing another shift. You cannot do it otherwise.

Q. Take a continuous operation business like the steel industry; what is the situation there?

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Mr. Goldwater: Objected to as immaterial.

The Court: I will allow it.

A. It has to work around the clock, otherwise the industry cannot operate, and consequently you have three shifts.

Q. And what ratio of pay as between one shift and another? A. Actually in the big steel case I believe that the difference was 4 cents for the second shift and 6 cents on the third shift. That is, the differential between the first and second shift was 4 cents, and 6 cents between the first and third shifts.

Q. Is there any difference with respect to a shift differential as to whether or not the men who work on one



shift or another are rotated? A. Well, the procedure is to avoid bookkeeping expenses. For the people who work on a shift the shift differential is incorporated in the hourly rates. In other words, if the shift differential were of such nature that by paying each 5 cents extra an-hour you would take care of it, and that would eliminate bookkeeping, but you can tell if it is a fact that when a man is doing the same work as a maintenance he will receive several cents less an hour than a man on a rotating shift doing the same job.

Q. I am not sure I follow you.

The Court: I understand. In rotating shift cases the thing is spread out evenly, so that you do not catch it right away as a differential, but it is there.

The Witness: That is correct.

Q. And where you don't rotate your shifts then very naturally you do have a clean-cut difference? A. Yes; you do in both cases, only in order to eliminate the bookkeeping problem it is spread evenly around.

Q. You, at the request of the War Shipping Administration, made a particular study of the longshore industry? A. Yes.

Q. Will you tell us what you did and what you were asked to do? A. I was asked to determine whether the night rate was an overtime rate, and I examined union contracts, releases, statements issued by the New York Shipping Association to its members, and summaries of discussions, and also newspaper releases, and I sought to determine from that information whether it is an overtime rate or not.

Q. Did you confine your studies to the port of New York, or was it broader than that? A. It was broader



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than that, but the evidence was largely taken from the port of New York, though I looked over a considerable amount of other information, the minutes of the unions in the industries, and the newspapers issued by the unions in the industries, and the discussions, of course, that went on in a number of government reports on the industries.

1007

Q. Going back for a moment to the matter of shift differentials, and your answer that you had never known one that was more than a certain figure, except that instance in the lumber industry, will you please tell us how extensive your investigation was of shift differentials?

A. Well, I believe that I examined several hundred cases in which a shift differential existed. I also examined some of the decisions by the governmental agencies, both in the last war and in this war, governing shift differentials. I examined I think at least 200 instances where shift differentials existed.

Q. When you say "instances" what do you mean? A. I mean a factory or plant or industry, in some cases where a shift differential existed or where a shift differential was ordered by the War Labor Board, some of them covering—well, in one case it covered close to 300,000 workers.

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Q. Did you examine all the War Labor Board cases? A. A very large number of them. I would hate to say all, but a large number of them.

Q. That means what? A. Several hundred.

Q. Have you come to any conclusion on the problem that was put to you? A. I have come to a conclusion.

Mr. Goldwater: The question is have you come to a conclusion. So that I may make an objection I would like the answer to be yes or no first.

The Witness: Yes.



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Q. Have you an opinion?

The Court: That is the same thing.

Q. As to whether the overtime in the longshore industry in the port of New York is true overtime, or whether it is a shift differential?

The Court: You may say yes or no to that.

A. I have an opinion.

Q. What is your opinion?

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Mr. Goldwater: I object, on the ground that the witness is not qualified to express an opinion which is relevant or material to the issue that is before the Court in the longshoremen's industry; that the case, in accordance with the testimony adduced by witnesses produced by this defendant, is one that is entirely unique; that the president of the union has explained a history with respect to overtime in this industry which is actually and factually at variance with the history as explained by the witness with respect to industry generally; that the variance is so clear and that the evidence is so definite with respect to the casualness of the work in this industry, the witness having not shown that in any industry examined by him there is the same casualness of employment; and that the opinion of this witness under those circumstances has no probative force and has no materiality or relevancy to the issues that your Honor has to decide.

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The Court: Very well. All of that goes to the weight. The objection is overruled. What is your opinion?



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The Witness: My opinion is that it is a true overtime rate.

The Court: As industrially understood?

The Witness: As understood and practiced.

The Court: You were not trying to give me the answer under the statute?

The Witness: No, sir; I was simply saying this, that I believe that in accordance with industrial practice the longshore industry overtime rate does not differ materially from that found in any other industry.

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The Court: And that it is overtime as that term is used industrially, and not a shift differential as that term is used in industry?

The Witness: Yes.

(Adjourned to Tuesday, June 25, 1946, at 10:30 a. m.)

New York, June 25, 1946;  
10:30 o'clock, a. m.

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• TRIAL RESUMED.

The Court: The Court, in colloquy with counsel, explained that one of the reasons which prompted the exclusion of the proffered evidence with respect to the economic impact of the plaintiffs' position upon the stevedoring industry was that it would open up a field of issues so vast and invite cross-examination and rebuttal testimony so extensive in character as to bring this type of evidence within the classification of evidence which is not admissible on any ground under Rule 43. The Court



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suggested that the witness be asked to condense his proposed testimony into a brief statement, which would then be marked for identification and be available to a reviewing court. Is that a satisfactory statement?

Mr. Goldwater: Yes, sir.

Mr. Taylor: Yes, sir.

PHILIP TAFT, resumed the stand.

Direct Examination Resumed by Mr. Taylor:

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Q. I believe when we adjourned yesterday you had stated it to be your opinion that overtime in the longshore industry here in the port of New York is true overtime. Will you be good enough to give us the reasons for your opinion? A. Yes, sir. First, I would say the relationship between the two rates is such that it would indicate that the second rate is an overtime rate. It is a rate of time and a half, which is a habitual and general rate paid for overtime. Also, the same condition prevails in other industries, and I may mention that an examination of contracts showed them the same type of an arrangement to exist among the carpenters, steamfitters, sheet metal workers, painters, electrical workers, cement and asphalt workers, stereotypists, breweries, optical technicians, machinists, glaziers, boilermakers, automobile workers, printing pressmen, retail delivery drivers, boot and shoe workers and leather workers, and furniture workers.

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By the Court:

Q. In other words, you mean that in these several trades there are collective bargaining agreements in effect which stipulate stated hours as constituting the normal day and



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penalizing by time and a half, or some substantial similar ratio, for work in excess of or out of that schedule? A. Yes, sir; the overtime hours are defined as a given number of hours, or may I put it this way: the regular day is defined, and a statement may be made that all hours worked outside of the regular day shall be paid at overtime rates, or at time and a half or double time.

By Mr. Taylor:

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Q. Professor Taft, as the Court worded its question to you, if I understood it correctly, you were asked whether or not the contracts in those industries to which you had referred were ones in which overtime was either in excess or for hours outside of a normal day, and you said yes; is that what you mean? A. I explained it.

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Q. Is that what you meant? Is that the way you understood the question? Well, let me put it this way: In the contracts in the industries to which you referred in an answer a moment ago, are those contracts all of a type which divides the day into two parts and fixes the overtime rate as applicable to work done outside of the normal day, regardless of the amount of hours that the man has worked? A. That is correct.

Q. All right. A. The regular day is defined, and all hours worked outside of the regular day are regarded as overtime hours.

By the Court:

Q. Let me ask you this one additional question, Professor Taft. You say that one of the reasons why, or one of the factors which induces you to arrive at the conclusion that this is true overtime and not a shift differential is that the same arrangements prevail in a flock of other industries. What is there to indicate that those industries



have true overtime and are not similarly affected by a shift differential? A. First, in most of the contracts the term "overtime" is explicitly used.

Q. That, of course, is true I think in the exhibit contract, or am I in error? In the L.L.A. contract the word "overtime" is used; but we want now explicit evidence.

A. Also the rate is of a character that you would find—

Q. In overtime? A. That is right.

Q. So we are back to reason-No. 1, which is the amount or ratio. A. The ratio; that is right.

Q. In other words the fact that there are many instances in which the same characteristics apply does not give us any clue as to whether this instance in that category is the one or the other; maybe the whole category is one of shift differential. A. Well, frequently in these contracts, sir, you find that the intent is clearly stated. We must remember that labor contracts are frequently drawn by ordinary working men and without the advice of attorneys or economists and the language is frequently imprecise. Now very often you will find that that overtime even under those conditions can only be worked with the special permission of the union officer. In other words, as you look at the entire picture, the conclusion seems to me flows from the entire picture that it is intended to inhibit work at certain hours.

Q. That is, it is an inhibition or penalizing provision? A. Yes, sir.

Q. And not simply the kind of provision which is meant to compensate for the somewhat less convenient time of work? A. Yes, sir.

Q. Your emphasis is that a shift differential is an arrangement whereby work is intended to be encouraged in all shifts— A. Yes, sir.

Q. —by the employers, but that a differential is paid in order to bring that encouragement about; whereas



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the overtime feature is a feature which penalizes the employer and tends to discourage employment during that time? A. That is correct. I believe that the order issued by the Director of Stabilization, or the then Director of Stabilization illustrates the point that you have just raised. Mr. Vinson, when he limited the payment of differentials in industry, that is, he limited the orders of the discretion of the War Labor Board, he laid down that 4 and 8 cents as a maximum which could be paid as a shift differential, in any industry. And he held that that was adequate to compensate for those factors which your Honor has enumerated.

Q. Let me ask you this question. In cases where you have a scale of compensation which you would regard as a shift differential, in other words we will say where the normal day's pay is a dollar an hour and nighttime pay is \$1.10 an hour, you would call that a shift differential? A. Yes.

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Q. In those cases, from your experience, is there also an overtime provision over and above the shift differential, and is that time and a half or substantially time and a half of the increased shift differential, or of the normal day's pay? A. Your Honor, I would like to answer your question in this fashion. I think I can find an example which illustrates your question perfectly, or I hope it is perfect. In the newspaper industry contracts, the regular day is defined and then certain hours are defined as overtime hours; but if a second shift is put on, that is a regular shift from 4 to 12, then those people do not receive the overtime rate but receive either 5 and 10 per cent in excess of the normal rate.

Q. Take the people in this shift, this shift No. 2 which is 110 per cent of the shift No. 1; if they work 50 hours instead of 40 hours, does your experience indicate that they would then receive 150 per cent of 110 per cent or



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do they get 150 per cent? A. They would receive time and a half of their shift rate.

Q. Although the overtime may fall within the period of shift No. 1 time? A. That is right. It would be regarded in those cases where a man worked in excess we will say of 8 hours a day, if the contract limited the day he would be paid on the basis of time and a half for overtime.

Q. What I am trying to get at is this, perhaps to put the word backwards: Does the fact that there is here absent a provision in the contract for overtime on a differential basis constitute evidence in your judgment that it is not a shift differential but overtime? A. Yes, sir. And I may say that the fact that it has inhibited, that actually it has inhibited a large amount of work would indicate that it is an overtime rate.

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Q. That of course is a matter of degree? A. Yes, sir.

Q. Even a 10 per cent differential tends to inhibit? A. That is right. But the difference of course is that a 10 per cent differential will be absorbed; is within the area that it is possible to absorb it by the spread of the overhead.

Q. By reason of more intensive utilization of tools of production? A. Yes.

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The Court: Very well. I want to return your witness to you. I did not mean to monopolize him.

Mr. Taylor: I would be delighted to have you continue.

The Witness: I should also like to call attention to this fact, that these changes that took place in the longshore industry with respect to hours of work were not isolated but were part of a general pattern. Now some industries are usually in advance and others lag and some are in the center. I think in the shorter hour movement the building



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trades have always led the way because they have always been the best organized and have the least powerful employers. But other industries tend to follow. And the longshore industry has not; the changes in hours have not taken place in isolation. It is not peculiar or specific, it is a part of a general industrial pattern.

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And then, it seems to me that another fact which leads me to believe that it is overtime is when the schedule of daily hours are changed. For example, at ~~the~~ time they were from 7 a. m. to 12 and then from 1 to 6. Now, your overtime hours were I believe from 7 p. m. to 7 a. m., somewhere in there; but as soon as that day was shortened then the hour of 7 to 8 a. m. became an overtime hour and the hour from 5 p. m. to 6 p. m. became an overtime hour. In other words, the shortening of the day immediately threw that in as overtime. And the same thing is true with respect to the Saturday. It is clearly brought out there. In 1924 I believe the Saturday half day was increased from 4 months to 6 months. How did that manifest itself? Immediately that Saturday half day in May and October became overtime hours. And in 1926 I believe Saturday afternoons throughout the year became an overtime period. And as soon as changes in hours are made new hours are pushed into that.

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And it seems to me that here you have hours being curtailed and a penalty is imposed upon extra hours of work to prevent their work.

Q. Talking about this penalty provision, Professor Taft, are you familiar or does your experience recall to your mind any instances in which the overtime provision



—or let me put it this way: The overtime device is used, quite consciously, to produce an increase in compensation with the intention of the parties that work shall proceed during the overtime period or a stated or contemplated period of time? That is, a situation, for instance, in which the day is fixed at 6 hours a day, it being understood that work will proceed 8 hours a day, and the intention being purely one of permitting a larger compensation to the employees without unduly changing the hourly normal rate? Are there such instances? A. I can't recall of any, but I can conceive of some. That is, an industry that wishes to maintain its wage structure and as a temporary device may offer a couple of hours of overtime in order to keep people. I think that certainly is possible and probable.

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Q. Wasn't that done on a fairly extensive scale during the war, as a means of increasing the wage earner's compensation and at the same time not to break the so-called line? A. Well, many devices were used during the war to get around the stabilization principle, such as the development of these health and welfare schemes under collective bargaining, and many others. As a general principle I don't believe that—except in cases where an industry would find it exceedingly difficult, temporary difficulties, in getting men would that be true. But certainly not an old established practice that has existed since 1872.

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Q. Does the condition that I have been describing prevail today in the coal industry? A. Bituminous coal?

Q. Bituminous coal industry. A. I don't think so, sir, because the 36-hour week under which the coal industry operates was really put in as a labor-sharing device back in the N. R. A. days, sir.

Q. What I meant is, does the coal industry operate on



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a 36-hour week or does it, in fact operate on a 48-hour week? A. I think it is about 43.

Q. 43 hours a week. A. Or 42.

Q. And doesn't that fact enter into the negotiations, in the collective bargaining negotiations in calculating out what the probable take-home pay of the employees will be? A. Well, of course we can only derive conclusions from the statements and actions of the parties.

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Q. You are the expert. I want to be educated on that. A. Your Honor, I don't believe that that entered into the contention of the union which tried to get a larger increase; considering incidental benefits probably the largest increase that has been given to any group in the United States.

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Q. So you don't think that that is an aspect of the industrial relations picture which is acquiring a degree of permanence or settling into a particular pattern where a day is fixed which is deliberately shorter than the contemplated day's work, with a view to increasing the hourly compensation in fact although not on the face of the instrument? A. Your Honor, I do not believe that that is so, for these reasons: If we examine the industries where the hours of labor are lowest, the clothing industries and the coal mining industry, the reason that those changes were brought about is what you might call chronic underemployment. And, as a matter of fact, those were work-sharing devices. And we can also see that in the clothing industry—I believe I am right, it is either 35 or 36 hours, one of those two; now, in the busy season they will allow a limited amount of overtime, but actually the reason that they have cut the hours of labor is to share the work. I don't believe that as a general principle labor ever intends to utilize overtime as a method of increasing its earnings.

Q. You say that is not a characteristic of a considerable



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number of working arrangements at the present time? A. I don't think so.

Q. If it were used, would you then call the penalized time overtime?

Mr. Taylor: May I interrupt at that point and ask whether your Honor means all of the overtime hours, or only those falling—

Q. I say, would you regard the period of time worked in excess of the stipulated time, but within the contemplated time, if I can so distinguish? In other words, assuming purely arbitrarily, where the contract stipulates six hours, a six-hour day, it was the intention of the parties that an eight-hour day shall be worked, but for the last two hours time and a half shall be paid and thus in effect you give the employee a larger day's pay than he would get from straight hours; in such a case, as a student of labor economics, would you say that those two hours were industrial-wise regarded as overtime? A. They would be so regarded, but I should like to add, if I may, that that sort of an arrangement is not likely over a period of time. I agree, sir, that instances can be found, and that has taken place, but it is by no means either a policy or a practice, because the one predominant feeling—it is a feeling because it is not a worked-out intellectual concept—of labor throughout its history, is the fear of unemployment, even in good times; and as you examine the conventions of the different unions, as you examine the statements of labor leaders, beginning with Gompers, or even before him, going back to Ira Stewart or even beyond that, you find this constantly repeated over and over again, that we do not want overtime. We want to reduce the hours of labor to spread the work. So I do not think, while I would agree that an arrangement of that kind is possible and occasionally does take place, but that is an unusual situation and certainly



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not one that could be regarded as normal, or from which practice could be derived.

By Mr. Taylor:

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Q. I think we were asking you to give your reasons for your opinion. Now you had given some, and doubtless many of them have been embraced in your answers to his Honor's questions. Are there any additional reasons you would like to give at present? A. I may simply state that in going through the literature I found in a study made of the "Longshoremen", written in 1915, largely on the basis of a good deal of the testimony before the then Commission on Industrial Relations, which a former president and Mr. Wolff headed, why, Mr. Barnes stated that the introduction of the night rate was designed to inhibit as far as possible work in night hours.

Q. Have you further reasons? A. No.

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Q. Is there anything in connection with statistics of which you are aware, the relative amounts of straight time and overtime, that has any influence upon your opinion? A. Yes, I believe that the material that I have been in touch with, that Mr. Smith developed here, certainly demonstrates that the overtime rate or the night rate has performed that function of preventing any large amount or substantial amount of work at night.

The Court: To the extent that during the war that was not so true you would say that was an abnormality occasioned by the extraordinary circumstances?

The Witness: Yes, sir; the industrial practice and concepts are long ranged. They are developed over a period of time, and war I hope might be regarded logically as an accident.

Mr. Taylor: We do not want to open up that question this morning.



*Philip Taft—For Defendants—Cross.*

1045

The Court: Well we will resist the temptation.  
Mr. Taylor: Your witness, Mr. Goldwater.

Cross Examination by Mr. Goldwater:

Q. First of all, Dr. Taft, would you mind giving me that quotation from Barnes, was it? A. Yes, I think I have it. It is on page 77 of "Longshoremen", and I believe that—I do not have the book right with me, but I think I will bring it to you.

Q. You mean you have it here in the courtroom? A. I think it is here.

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Mr. Taylor: Would you like to see it?

The Court: You might identify Mr. Barnes for the record. I think we all know who he is, but would you identify him?

The Witness: He is the author of a book called "The Longshoreman", a study of the longshore industry. Shall I read it, sir?

Q. Yes, I would like to have the specific quotation. A. "Two or three years later an attempt?"—

Q. This is on what page? A. Page 77. Do you want me to give the entire quotation? It is Charles B. Barnes. The book is "The Longshoreman".

1047

Q. Published when? A. It was published in 1915, by The Survey Associates, New York, and I shall read the quotation.

Q. Will you give us the page? A. Yes, page 77, "Two or three years later a demand for 33 cents was granted, and about 1868 another protest was made and the rate was raised to 40 cents an hour for day and night work, but foremen took advantage of this uniform rate to do a great deal of night work. The piers were small, and trucking and tiering could be carried on at greater advantage at



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night when there were no teams to interfere. The men protested against this, and with the desire to cut out excessive night and Sunday work they demanded a high rate for working at these times. In 1872 this demand procured them an advance to 40 cents an hour for day work, 80 cents for night work and \$1 for Sundays."

Q. The book, you say, was published in 1915? A. Yes.

Q. And it recites the history of this inhibition theory as far back as 1870 some odd, was it? A. Yes.

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Q. Has that purpose, that theory, that assumption, always been prominent in the formulation of the contract relations between the workers and the stevedoring companies since that time? A. I should say this, that—

Q. Is that a question that you can answer yes or no, Professor?

Mr. Taylor: You think he should be held to that?

Mr. Goldwater: I am asking him first. I am not going to hold him if he says he cannot. I am asking him can he?

The Witness: I believe that that has been the predominant purpose, yes.

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Q. And that has continued to be the predominant purpose from 1870 down to date; is that correct? A. Yes.

Q. In assigning your reasons for distinction between the shift differential and true overtime, you stated that in one or more cases the parties called it overtime; is that correct? A. Yes.

Q. Is that one of the reasons that influenced you in determining that it was true overtime and not shift differential? A. No, sir; that was not one of the reasons.

Q. Why did you then mention it as a factor in your consideration? A. I think I just elaborated a particular point. I did not give that very great importance, and I will ask your permission, and if you do not want me to I shan't



do it, that I can tell you exactly how I reached that conclusion, and the history of my relations to this particular problem I think I will demonstrate that I was not influenced by the particular terms used.

Q. I will accept your answer that you were not influenced, Professor. We will be here until next week if we are going to have a complete elaboration on every thought that you have. A. I am sorry.

Q. That did not influence you? A. No, sir.

Q. In any case in which you examined contracts that you have mentioned in your direct examination, did you give any weight whatever to the descriptive term used for the hours outside of the so-called regular hours of employment? A. No, sir; I do not think that the term used is of significance.

Q. All right, and you would say that that equally applies in the case of the longshoremen's contract? A. I would say that.

Q. The fact, then, that this was called "overtime" for the last 60, 70 or 80 years, in all written arrangements for employment in the stevedoring industry, would have no significance whatever in a determination of whether this payment for so-called night work is or is not true overtime? A. It would reveal what the parties regarded it. I would try to use my judgment, not only to determine the intent of the parties but what its intent is as far as the effect on operations might be. In other words, I would not go as far as saying that the language that the parties used in arriving at an agreement was of no influence in trying to determine what they had in mind when they were making the agreement.

Q. Did you give it weight in making up your mind as to what this was, or was it just a matter of historical interest to you? A. Well, if I had found it independently, I think what it did is corroborate what I would have



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reached independently of it. I think that it has corroborative weight in my mind. The fact that they referred to it as overtime would corroborate my first impression and conclusion that it was.

Q. You have examined the contracts here, haven't you? You have been shown the contracts in vogue or use in this industry in the port of New York for the last 50 or 60 years? A. Since 1916 I looked over the contracts.

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Q. Did you find the term "overtime" employed in those contracts—how far back? A. I believe somewhere in the late 1930s the term "overtime" was introduced. Prior to that time it was referred to as "night rate", but—

Q. Referred to as a night rate?

Mr. Taylor: Excuse me, didn't you say "but"?

The Witness: Yes.

Mr. Taylor: Won't you continue with your answer?

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The Witness: I would say this, that the terms "overtime" have appeared and reappeared in the discussions of the problems in the releases and in the information that was circulated among the employers, and also in the union leaflets. In other words, the term "overtime" was never absent. It was absent from the contracts, but it was not absent from the discussions nor from the information that the stevedores circulated among ourselves, or the union circulated among itself.

Q. The term "night rate" was used from 1930 back, wasn't it? A. Yes.

Q. Did you give that significance and consideration, that concept, as applicable to your concept, as applicable to this case? A. Yes, sir; of course I gave it consideration. I considered it in the light of all the circumstances, first



that it was purely and customarily a term used out of habit or custom; secondly, that obviously when the stevedores were discussing the problem of a union agreement among themselves, that the unions were discussing, or the members were discussing demands among themselves, they used the term "overtime", and also in relation to the word "rate", would also indicate to me overtime. So here I had an overwhelming amount of evidence against this one term. Of course I considered it, but I do not believe that I could draw a logical deduction from that that it was not overtime.

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Q. You gave consideration, then, to the term which the parties had used up to 1930 odd? A. Yes.

Q. Then you rejected it as having any influence and indicating the intent of the parties; is that right? A. I did not reject it. I regarded that as a synonym for the term that they used in other connections to discuss the same problem and the same question. I do not believe that I rejected the term. I think that the term means overtime. It is a synonym for it.

Q. I see. And in your concept of terms in labor economics you would use "night rate" and "overtime" as interchangeable, would you? A. If the night rate showed the characteristic of the night rate in the longshore industry I would use it interchangeably; yes, sir.

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Q. And the characteristic, as I have it from you in your testimony yesterday is this, if I may quote your language— A. All right, sir.

Q. It is that overtime in your opinion is when it is a rate designed to inhibit work at the hours mentioned, or after a given number of hours; is that right? A. May I clarify that a bit?

Q. You certainly may. A. I meant that overtime might be a number of hours, that is, hours after a number of hours had been worked, or specifically enumerated hours.



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Q. You said that very clearly. A. Yes, that is what I mean.

Q. There is no question about what you said, Professor. And you added that you can recognize whether it is a shift differential or whether it is an overtime rate. Those are your words? A. I believe you can, yes.

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Q. Suppose you tell me as clearly as you can how you, Professor Taft, can recognize whether it is one or the other? A. I can recognize it by the relationship between the second rate and the first rate. If it is an amount that is usually imposed as a penalty or is designed to prevent work at certain hours, I would hold it to be an overtime rate.

Q. How do you determine whether it is usually imposed or is designed to prevent work at certain hours? Is that a subjective study with you, Professor Taft, or is it objective? A. No, it is subjective.

Q. I see. Then it is a question of what your reaction is to the facts, your personal reaction to the facts, which determines when you say you can recognize? A. Do you want me to answer that question?

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Q. Yes, of course I would like you to. A. If you mean my personal reaction to the facts, what I do when I see a situation, I attempt to judge it in the light of my knowledge and experience. If you call that a personal reaction, that is correct. I did not know that judgment is anything but personal. It is a matter of judgment.

Q. I would like as specific an answer as you can give me as to how you recognize whether it is a shift differential or an overtime rate. Let me call your attention to the fact in connection with the question, Professor, that so far you have told me only one reason; and in answer to his Honor's series of questions before you related every thing to that one reason, to wit, the relationship between the two rates. Now is there any other reason?



The Court: Or any other index of identification.

Q. Of course, that is what I mean, that aids you in recognizing it. A. No, the reason is as given. I think that is correct. I think that is the heart of the entire problem, what is the purpose of those rates.

Q. That is not the same thing. You say now you determine what is the purpose. I asked you if there was any other factor or index, or his Honor used the word "index", that would indicate to you the recognition of the difference? A. No; I would try to determine this. If you gave me some raw rates, if I may use the term.

Q. I think I know what you mean. A. And I noted that there was a time and a half rate, I would normally assume, and that assumption is supported by a large amount of evidence, that that rate was designed to prevent work. If, on the other hand, there was a small change between one rate and another, it would seem to me—it could be reasonably inferred that what you are trying to do is to compensate people for working at less attractive hours, and that this difference is really, as it was phrased by the War Labor Board, some compensation for differences in job content.

By the Court:

Q. Supposing you had this situation: I want to get the degree of significance that you attach to express purpose. Supposing you had a labor agreement which said that in order to inhibit work between the hours of 4 and 6 in the afternoon the rate shall be 110 per cent of the normal day's rate for those two hours; would you call the overtime provision or a shift differential? A. A shift differential.

Q. Supposing you had this situation: Supposing you



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had an agreement providing for fliers who fly large and heavy aircraft, and it said flight by day shall be \$2 an hour, flight by night shall be \$4 an hour, and said nothing else, would you call that a shift differential or would you call that an overtime provision? A. I think that you might have to discover whether the job content was so radically changed.

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Q. In other words, I picked a hard case. A. Your Honor, may I say just one word on this question of shifts? Before there is a shift differential you must have a regular shift. Now, you can't have a shift differential without the existence of shifts.

Q. Suppose you had a flying agreement which said the normal flying time shall be from sunrise to sunset and during those hours the rate of pay for flying shall be \$2 an hour for all flying performed whether begun or continued through and after sunset and before sunrise the rate shall be \$4 an hour? A. I think that that is an overtime rate, and for this reason, that under normal circumstances a wide spread between two rates of pay for the same job could not be normally maintained.

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Q. Would you be interested in such an agreement to discover, for instance, whether the risk of employment was much greater during night flying than during day-time flying and, therefore, treat it as a shift differential? A. If it could be demonstrated that that were true, that the content of the job in one period were significantly different, a rotation would have to be made. I think, your Honor, I would be willing to accept that.

Q. Would accident incidence be a factor that would affect the judgment in such a case? A. If it could be demonstrated that the accident incidence were significantly greater, I think that you might draw the conclusion that there was compensation for the difference in risk.

Q. Supposing you had an industry which, of necessity,



operated round the clock, then would your judgment be affected by that, regardless of the ratio of compensation? In other words, supposing you said that for railway engineers operating transcontinental railways the rate of compensation should be \$1 an hour between the hours of 8 in the morning and 5 in the afternoon, \$2 an hour between the hours of 5 in the afternoon and 3 in the morning, and \$3 an hour between the hours of 3 in the morning and 8 in the morning? Manifestly, that is not intended to inhibit railroad transportation. A. Well, it would reduce—

Q. It would tend to do that? A. It would tend to reduce all the possible traffic; that is, the railroads would run transcontinental trains but certainly would not run locals at those hours where they would have to pay—

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Q. This was a rate that I limited to transcontinental. A. Transcontinental is in the nature that could be defined—

Q. Of a round-the-clock operation. A. In the nature of an emergency. With any of the union contracts, that is the reason there is not an outright prohibition; there is no union contract that I know—there may be some—that explicitly prohibits work beyond a certain time, because there may be a job that is in the middle, you may spoil materials, you may require the filling of an order. So you can't, it seems to me, outrightly prohibit. Now, your example of a transcontinental train seems to me would come in the nature of an emergency; that you couldn't stop at Kansas City.

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Q. You could not call an emergency that which is scheduled to occur every day of the year? A. Well, it is an economic emergency. I think, because the railroads could not handle the problem any differently.

Q. That is right. The same as operating a ship at sea. Suppose you found a contract for seamen at sea which



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provided for 50 cents an hour between the hours of 8 and 5 and \$1 an hour for the hours from 6 to 8 in the morning. What would you call that? A shift differential? A. No. I would call it an overtime rate.

Q. Even though it was on board ship, where obviously it is not intended to inhibit work A. Well, it would inhibit work, because a large amount of the work at sea can be done at different hours. In other words, only the engineers and, I suppose, some of the sailors were on immediate duty, but there is a great amount of work that would be concentrated.

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Q. I have to modify my example. Suppose you had a contract which provided for engineers and helmsmen only on board ship? A. I am afraid that you are cornering me.

Q. I am cornering you because I want to know just at what point you would abandon your ratio and say that other factors may predominate. In other words, supposing you had a contract that provided that helmsmen on ocean-going vessels will be paid \$1 an hour during the daytime hours and \$2 an hour during the nighttime hours. Would you call that a shift differential?

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Mr. Taylor: Would you include in your question how many helmsmen you have on board? I assume that you have to have somebody at the helm.

The Court: I am assuming that there is somebody at the helm 24 hours a day.

Mr. Taylor: How many have you got?

The Court: I don't know.

Mr. Taylor: If you only had one man on board the situation is vastly different from what it is if you had plenty of men there.

The Court: I assume that you could not have one man on board unless you were going to keep him operating for 24 hours.



*Philip Taft—For Defendants—Cross.*

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The Witness: You would need three men.

Mr. Taylor: I think you would have to have some number in there to make your question realistic, sir, if I may say so.

The Court: Suppose you have the necessary complement there. ~~Say~~ at least three.

Mr. Taylor: You would have three 8-hour shifts, you mean.

The Court: I don't know.

Q. You have three men on board, or maybe 15 men, all men on operations which are round-the-clock operations; the radio man, the helmsman, the fireman, the engineers, and so on. I suppose there are a certain number of operations on board ship which are in continuous operation. A. Yes, sir.

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Q. Now, let us group those into a single union, the "round-the-clock operations union"; and you have a contract with respect to those men which says daytime hours \$1, nighttime work \$2. Would you say that is a shift differential or an overtime rate? And nothing more appears. A. I would be inclined to call it a very unusual kind of overtime rate, sir. I would stick to my definition because I think—

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Q. Well, now, would you stick to your definition? Your chief ingredient of your definition is the inhibitory effect?

A. That is right.

Q. Here you have a situation in which it has no inhibitory effect and, moreover, it is not designed to have an inhibitory effect. A. But, your Honor, any contract of that kind would get back to the example that you gave before, where the purpose of that overtime provision would be to increase the rate. And I would say that that would be a very unusual situation; that in the normal industrial practice you are not likely to get that.



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Q. I agree with you that that would be an unusual situation, and manifestly in trying a case of this kind we do come up against the unusual situation, because the obvious does not get to the issue. That is clearly so. In other words, when a case gets in here it is because there are two plausible views which have to be resolved. If one was manifestly right and the other manifestly wrong it would not be in court.

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Now getting, therefore, this hard situation, the situation where work has to proceed around the clock, you have a ratio of 2 to 1 for nighttime as against daytime. What would you call it? Overtime or shift differential?

Mr. Taylor: I understand we may object to your Honor's questions?

The Court: Yes, you may.

Mr. Taylor: I still think that it is only fair—I mean, it will tend to develop the thinking more if we have in your question something as to whether there are shifts and how many men you have on board. I think you are assuming, sir, a situation which is impossible of existence in any industry, including ships at sea.

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The Court: I am assuming quite a group of men.

Mr. Taylor: In other words, whenever you have a round-the-clock operation you will of necessity have assignments within the normal 8-hour stand of whatever number of men is necessary to fill it. If you want to assume just for the sake of theoretical discussion any combination in which you have an admitted shift system and you put in an extraordinarily high differential, why, you state a situation which probably would never be found to exist.

Q. I will assume the situation which normally does obtain on board ship which is that the man's tour of duty



*Philip Taft—For Defendants—Cross.*

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shifts from day to day progressively and rotates, so that in the course of a voyage the man serves in all periods of time. A. Your Honor, under those conditions what you really get, and I think that that would be the practice, is a spread really of this so-called—what you would get is an increase in the rate. In other words, every man would receive \$1.33 an hour because ~~of the fact that in their~~ rotation they would all absorb one-third of the difference. So what you are actually getting there is an increase in pay, and—

Q. When you get an increase in pay, or when you so regard it as an increase in pay, then it begins to approach the shift differential rather than overtime; in other words, it becomes part of the normal compensation of that person?

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Mr. Taylor: May I interrupt again?

The Court: Certainly.

Mr. Taylor: Do you mean, when you get an increase in pay in a situation where there is a shift—

The Court: No. The Professor says, as I understand him; that in such circumstances the more normal way to translate that desire into effect would be either actually to give them an increase per hour pay for all hours and abolish this differential or in net effect it would be translated into such an arrangement and that the man would regard himself as receiving \$1.33 over-all rather than \$1 an hour for daytime and \$2 an hour for nighttime.

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The Witness: The problem as I see it arises largely that you have assumed the existence of shifts, and where there are actual shifts there are regular shifts. It is not likely that you would get



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that type of difference. That is not likely. In the examination of—I think I have them here, quite a number of cases—

The Court: I think we will have to suspend. We will have a short recess.

(Short recess.)

The Court: If counsel will bear with me I will just ask one other question.

1085 By the Court:

Q. Professor Taft, what I was trying to get at in the few questions that I pursued by hypothetical example which in a way are unreal, because I will agree that there are either none or very few such actual situations in life, but what I was trying to get at was this: I assume that your view is, and you correct me if I am in error; that you do not maintain that the  $1\frac{1}{2}$ —1 ratio is the invariable guide to overtime as against shift differential, and that once you have found the ratio of time and a half you must decide that it is overtime regardless of every other fact? A. Well, no, sir. It is quite possible for the conditions that you assume to exist; but I would say this, that they would be abnormal, a deviation from the norm, and would take place under very special circumstances.

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Q. Can I put it in legalistic terminology, to which I am more accustomed than to the economists' language, to say that when you find a time and a half ratio you have a fair presumption that it is time and a half which may then be rebutted by strong evidence to the contrary?

Mr. Taylor: Does your Honor mean we have a presumption that it is time and a half or that it is overtime?

The Court: That it is overtime.



A. I would agree with that.

Q. That is a fair statement of your view? A. That is right.

Q. Now what I would like to ask you is, what type of evidence could rebut that presumption? To give you an illustration of what I mean, does the fact that the time and a half rate is under the circumstances incapable of performing an inhibitory function constitute evidence which would tend to rebut that presumption?

Mr. Taylor: Could I ask your Honor what you mean by incapable?

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The Court: I mean that if the operation is a round-the-clock operation which must go on 24 hours a day so that it is compulsory to infer that the higher rate is designed and cannot accomplish the purpose of inhibiting work during the penalized hours.

A. May I answer your question in this fashion, that a rate, a wage rate is paid for several—well; may I call them factors; the skill of the individual, the risks, the unpleasantness of the work, the dangers, all of that will determine the rate. Now, when we go into any industry you find that there is usually what is called a job—a wage structure. Now, what is the wage structure? It is the relation of one wage to the other. How is it determined? I don't suppose it is determined always with great precision, but there is an attempt made to estimate. What is the importance of this factor? Education, experience, risk. An extreme example might be a man working with a pick and shovel on a building who may receive \$1.00 an hour, while if he works under pressure building an under-water tunnel he may receive \$3 an hour. Now, the reason for that is for the peculiarities of the job, for the special dangers to his health, and risk.

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Q. I follow that. A. And there of course you don't



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*Philip Taft—For Defendants—Cross.*

find that, or you are being compensated for something that is in the job. In other words, the content of the job is different.

Q. I suppose old-fashioned economists say that it is determined largely by supply and demand. A. Yes.

Q. And that in order to get the supply of labor for the kind of peculiar job that you specified, a differential has to be paid? A. That is right, sir.

Q. The free play of the market when it is uninfluenced by legislation or unions will produce that kind of a differential? A. That is right.

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Q. That does not answer my question, however, which is: Where you have a set of facts which preclude the inference that the time and a half ratio has an inhibitory effect, precludes the inference that it is designed to have an inhibitory effect, do those circumstances constitute evidence—that is what I am asking you—do they constitute evidence which would have to be considered in rebutting the presumption that we have arrived at?

Mr. Taylor: I wonder if I would be trespassing on the techniques here—

The Court: No, you would not.

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Mr. Taylor: —if I should ask your Honor to make an addition to your question by asking Professor Taft whether the change which occurred in the potteryware industry when they shifted from a 6-kilo to a continuous operation might afford an answer to your Honor's question?

The Court: I am not prepared and not sufficiently well informed to lead the witness by suggested examples. I am purely now engaged in the Socratic process.

Mr. Goldwater: Of course that is where Mr. Taylor has it on all of us—his ability to lead the witness.



Q. Do you get my question? A. I understand your question, but here is the problem that I face. Your question assumes a condition which to me does not seem economically feasible. In other words, the amount needed to attract a worker to another shift is usually a few cents more per hour. And of course I can't see, knowing employers, why any employer would want to or need to pay that great differential on a shift because the content of the job does not change so drastically between one shift and another. In other words, here you have a condition: Does the nature of a job, handling the same material, exposed to the same general risks—they may be slightly greater or the same; does the content of that job change drastically?

Now it seems to me, your Honor, a bit unreal to assume that a firm that can hire a man on the first shift for \$1 an hour would have to pay \$2 on the second shift.

Q. In other words then we come back to the fact that your presumption is irrebuttable because economically you say that the rebuttable evidence can never exist. So, therefore, we resolve the question first by saying that where you find a ratio between one time of the day and another time of the day of one and a half to one or more, the presumption is irrebuttable that that is an overtime rate, and that no evidence can be envisaged which would cause you to come to the conclusion that it is a shift differential. And when I say envisaged I mean in the light of your experience as an economist dealing with economic realities. I don't mean logically envisaged. I now mean realistically envisaged. A. Thank you, your Honor; I was going to take exception to your term "envisaged," but you have clarified it. And I shall answer I agree.

Q. All right. That is all I am driving at, is to try to get a precise understanding of your view. A. Yes. Because I don't see any economic need, for, after all the contents of a job between 5 and 6 is not substantially different than



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4 to 5. And the increase would not be economically warranted.

Q. What about the possibility that it is used by a powerful union as a device for actually increasing the normal day's pay? A. Well, in this instance I would hedge slightly my answer in order to be fair; I would say that that can be envisaged economically. But in the light of the general attitude and the historical experience of unionism that that is not likely to be the case.

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Q. Not likely. Nevertheless, you would now come along to this point, at least as a possibility. Let us suppose you had a powerful marine radio operators union which has to be tended 24 hours a day. It is conceivable that, from a public relations point of view, they would rather say they are asking for a dollar an hour straight time and two dollars an hour overtime rather than to say they are asking for \$1.50 an hour. And therefore it is possible, since they operate on a rotational shift basis, to say that they are asking for \$1 an hour for all daytime hours and \$2 an hour for all nighttime hours, the parties perfectly well understanding that the net effect is that the radio operators are going to make about \$1.60 an hour as a result of that scheme of operation. In such a case would you call that an overtime rate? A. Well, if it is as you have stated it, it would not be, sir.

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Q. It would not be an overtime rate. A. But I again wish to emphasize this fact, that certainly that type of devious approach to the problem of increased wages is not only untypical but would be very rare.

Q. Let me ask you this, perhaps to drive my point just a little further. If you found such a case, express and explicit, then would you even call it a shift differential? Would you not call the higher rate the normal rate? A. Well, it would seem to me—

Q. Calculating it on the basis of arithmetic. A. That is right. It would seem to me that, after all, the intent there



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was simply to get 33 cents for each person around the clock. In other words, a dollar increase; one person is on the second shift, and on the third shift, and actually I would say they were getting \$1.33 an hour.

Q. That would be therefore their normal wage, their regular wage? A. Yes. I would say there that you had a condition of a disguised wage increase, and I think that under those circumstances that whole problem of whether it is a shift or overtime would not exist.

Q. You would be beyond those two classifications; you would be then in the field of determining the regular wages? A. Right. I think that would be my conclusion, that what they were actually doing was to get an increase in overtime—rather, an increase in their daily hourly rate.

1100

Q. What evidence would you require that such is the fact? Would it be an explicit statement in the labor contract, or just what evidence would lead you to draw such an inference?

Mr. Taylor: May I ask whether your Honor is still assuming the existence of the continuous round-the-clock operations?

The Court: Yes. And the rotational shifts.

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A. Well, part of the evidence would be undoubtedly the spread between the rates, the spread between the rates. I would ask myself the question, now what is there, why should a man be compensated, and, after all, he is rotating around; why is this difference there? And certainly it can't be justified economically. The content of the job is the same or pretty much the same. I would ask myself that. And to some extent we would have to examine the history of labor relations in that particular industry. The intent of the parties might reveal something.



1102

*Philip Taft—For Defendants—Cross.*

Q. So, if you found a case where there was a rotational shift and a scale of index 1 for normal time and  $1\frac{1}{2}$  for the non-normal day, as defined, where there was no economic explanation of the differential you would say that it is really a system of distinguished wage costs? A. Yes.

Q. Now, let me ask you one final question, and to this an objection will be made, and maybe I shall sustain it.

1103

Would you call the three-shape-up system, three-shape system in the longshore industry, a three-shift arrangement with voluntary rotation on the part of the employees, since they can appear for any shape that they choose? A. I was waiting for the objection.

Q. There being none, you may answer the question.

1104

A. I will answer the question. No, I would not regard it, because after all a man is not—the shift was not laid out there that a man begins at this hour and quits at this hour and he reappears every morning regularly. A man who works on a shift, what does he do? He works; let us say that the shifts rotate every week. Well, every day, every working day he will appear at a given time and quit at another time and someone will take up there and quit at another time and so forth. You don't have that regularity of work. You have simply the regularity of applying for work.

Q. Well, all right. That is in a sense true in every industry which is slack. A man shows up for work and the foreman says, "No work today," and he goes home. A. But he shows up for a specific time of work.

Q. Yes. Isn't the shape-up time a specific time? The shape-up time I have been instructed in this case is 7:55 a. m., 12:55 p. m. and 6:55, I think, p. m. I haven't yet heard the claim made that for those five minutes it is within the portal-to-portal case.



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1105

Mr. Goldwater: That will come later.

A. Moreover, as you have enumerated, the shape is within a regular working period.

Q. Yes. A. In other words, here is the regular day, from 8 to 5, and here are men applying for work at this particular period. I don't see the shape-up as a shift. It is purely hiring time.

Q. Wouldn't you call the 6:55 p. m. shape at least a shift? A. No, I would not sir.

Q. Now then, tell me why. A. I would not because it is not a regular period that is outlined very definitely for men to arrive to go to work and work a given number of hours and then leave regularly every day. In other words, a man can work all day or all night, whenever he can catch a job. It is not a matter of men appearing at 8 o'clock and working until 5 or appearing at 5 and working to 1. It is a matter of a man getting a job at given hours.

1106

Mr. Taylor: Am I to assume that your Honor thinks there is a shape at every pier three times a day?

The Court: No. I assume there is a shape only at those piers at which there is work to do.

1107

Mr. Taylor: That is right.

The Court: And that by way of the grapevine the men know which piers are going to be shaped, or may know by visual inspection if they see boats come in. Also, I suppose there are men who keep in touch with their officers and get a pretty good idea when they are likely to get work. Then I suppose there is a percentage amongst longshoremen who don't want regular work, they prefer the non-regular work. I say a proportion.



1108

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The Witness: That is right.

The Court: And I suppose there are those who undoubtedly work five days a week, the same as a man making hats in Danbury.

Q. Let us take it this way. During the wartime there was plenty of work for everybody who wanted to take it; isn't that right? A. Yes.

1109

Q. That is, at almost every pier. And that the lack of work at a particular pier was as abnormal a situation as a machine going out of order in an industrial factory and the man having to be laid off that day. Now, during that period there were a group of men that showed up every morning for work at 7:55 and they worked until 5 every day; another group showed up for work at 6:55 and they worked a period of time thereafter, under the contract not less than 4 hours.

Now, why isn't that a shift? A. It is not a shift I would say largely because this device of time and half for these hours was worked out in the industry in order, under normal circumstances, to prevent work at those hours. And the evidence indicates that that is true.

1110

Q. I follow that. A. And it seems to me that you cannot—by "you" I am using the general "you", sir—you cannot interpret the meaning of an industrial practice that has been developed over a period of time and that has been worked out between the industry and its collective bargaining agents in terms of abnormal circumstances.

Q. Well, let me ask you just this last question; I think I shall then surrender my function of cross-examining.

Would you agree or disagree with the proposition that longshore is industrially speaking sui generis? A. No, I would not, sir; not to any other degree than any other industry. Every industry has particular characteristics.



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1111

Some of the characteristics of the industry may be due to laziness or slovenliness or lack of efficiency, but so is the steel industry.

Q. Have you any other industry in which you have a new hiring at every period of employment, every daily period of employment? A. No, none that I know of, sir.

Q. This is the only one where that prevails? A. Yes. But the industry in its practice with respect to hours and overtime has followed the general pattern of American industry.

Q. I understand that. But at least it is sui generis in that it is the only industry that you know of which has a new hiring for every daily period of employment. Is there any other industry that you know of where the employee does not have a long time employee-employer relationship with the same employer but where he changes employers with the frequency and rapidity and fluidity that he does in longshoring? A. No. I think that those two characteristics are—

1112

Q. Are unique? A. That is right. But I do not believe that those establish particularly the overtime or the hourly practice of this industry. I think that it is part of the large—the changes that have taken place there are changes that are in other industries. The fact that you have definitions of overtime in other industries similar to longshoring, the fact that it went through the same process of changes as other industries at approximately the same time, the fact that the relationship between one rate to the other is the same has existed in other industries—I mean, all of those seem to me to be more preponderant characteristics than those that have been enumerated by you, sir.

1113

The Court: Very well, you may continue, Mr. Goldwater.



*Philip Taft—For Defendants—Cross.*

1114

By Mr. Goldwater:

Q. Before I proceed, Dr. Taft, would you be kind enough to tell me what release you referred to when you said that there was an order of Stabilizer Vinson which laid down a 4 and 6 cent as a maximum that could be paid as a shift differential? I would like to see that order. A. It was issued on March 8, 1945, and I am very sorry that I cannot give you—

1115

Q. The date will be sufficient. I should think we should be able to find it. A. Do you want me to read a quotation from it?

Q. Is it very long? A. No, it is two sentences or three sentences. It ordered the following policy:

“Shift differentials and non-continuous operations not to exceed 4 cents per hour for the second shift, and 8 cents per hour for the third shift.”

Q. Had it reference to a particular industry? A. No, it was a general order given to the War Labor Board, a general directive on what policy that Board was to pursue with reference to ordering shift differentials.

1116

Q. It had to do with the policy of ordering shift differentials; it did not in any way limit the amount which might be voluntarily paid for shift differentials? A. Oh, no sir, because at that particular time the War Labor Board passed on all voluntary increases, and there was great pressure to loosen up. As his Honor has indicated here, there was a lot of pressure to loosen up and get around the stabilization orders, and this was a directive to the War Labor Board telling the War Labor Board, or instructing it to limit differentials, whether voluntarily reached or ordering them down to those amounts.

Q. May I ask you whether you know that that specific order to which you have referred had any exception in it? A. I do not recall right now.



*Philip Taft—For Defendants—Cross.*

1117

Q. And your material here is nothing more than those paragraphs which you read? A. That is right.

The Court: The only exception I noted in your statement was that it applied to non-continuous operations.

The Witness: But on continuous operations it was lower, because the most favorable treatment was given to non-continuous operations, because those were the industries that had to attract people, not having operated shifts prior to the war.

1118

Q. Do you know whether or not the effect of this order was not to disturb in any way prevailing practices in an industry? A. Oh yes; it had nothing to do with the prevailing practice.

Q. Then the issuance of this order by the Stabilization Director had specific purpose in connection with unusual increase in wages from the standpoint of the inflation effect, did it not? A. Yes, the intent, of course, was to limit wage increases, but the Stabilization Director regarded those differentials as adequate for the purpose of attracting workers to the non-desirable shifts.

Q. That would be, of course, in companies where it had never been paid before; would it not be so? A. That is correct, sir. 1119

Q. And in companies where there had been a greater variation they were not only disturbed, but the experience obviously from the fact that they were continued, those practices were continued, indicated that those practices served the purpose of obtaining employees for those different shifts? A. Yes, sir; the policy of the Stabilization Director and of the War Labor Board was not disturbed in any appreciable measure any practice. I merely cited those to indicate what a shift differential is.



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1120

Q. No, but you did not in citing them indicate that the purpose of the issuance of the order was for its economic effect upon a fearful inflationary trend; isn't that so? A. You are quite right.

Q. And that was the sole purpose to which the Economic Stabilizer had directed his attention; isn't that so?

1121

A. No, I would not agree to that statement, because the Economic Stabilizer was faced with two problems—get war production and prevent inflation. He had to devise a policy which, while being anti-inflationary, would also be effective in allowing firms to attract labor to the non-desirable shifts, and he obviously thought that 4 and 8 cents were adequate for that purpose.

Q. In spite of that directive do you know of your own knowledge, Professor Taft, of numerous devices that were employed to provide extra compensation for the various shifts? A. Not on a shift basis, but I do know of quite a number of devices that were used to evade the stabilization order.

1122

Q. This stabilization order as well as others? A. No, not that particular one. It would not be necessary to evade that one. The problem—we should not be talking of evasion, perhaps, here, but the problem as it presented itself to an employer would be to get around this limitation that the War Labor Board would place upon him, and usually it was gotten around by paying for insurance, by setting up a welfare fund, by combinations and in that manner, but on all shifts. That is, it was throughout the plant rather than on a particular shift.

Q. And you do not know of any cases in which there was a particular drive towards these evasive tactics in order to secure sufficient employees on night shifts? A. No, sir; I do not know of a single one. I was an employee of the War Labor Board, and I could not officially know of it, anyway.



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1123

Q. Oh, that may explain your lack of knowledge. A. But I did not know.

Q. Is the fact that you were an employee of the War Labor Board—does that perhaps explain that your interpretation of these devices might be quite different from that of another person? A. Oh, no sir, I was only a per diem employee, anyway, but I would not allow that to influence my opinion.

Q. You do not think that even unconsciously you might be influenced in your opinion by the fact that you were then an employee? A. Sir, without being facetious, I certainly would not sit here and say that I am not unconsciously influenced by things that happen around me, but I will say that I have tried not to be consciously influenced.

1124

The Court: You have devoted a lifetime to screening out unconscious influences?

The Witness: I have tried to.

The Court: That is what professional work means.

The Witness: I have tried to be as objective as possible. I would not agree that I can be perfectly objective. I do not claim that.

1125

Q. Now, Professor, you have used the terms "shift differential" and "overtime rate", and have not described "shift differential" except in terms of the purpose to be achieved; I would like to ask you whether in using the term "shift differential" you used it in a broad enough sense to include a rate of pay for a time worked which was not normal day hours time? A. No, sir.

Q. Not in that broad sense? A. No, sir; I used the term "shift differential" to describe an extra payment, a small extra payment that is given to people who are



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employed on the less desirable shifts, and to use the expression for some change in the content of the job, the content of the job meaning that it is less pleasant to work between the hours of 5 and 12, when your family life is disrupted than it would be between the hours of 8 to 4.

Q. Would you include also the hours of 1 a.m. and 7 in the morning? A. Oh yes, I mean that; that is right.

Q. You say that you used it to describe the payment of a small difference in rate of pay; is that right? A. That is right.

1127

Q. Then you would never use the term "shift differential" to describe a difference for the purpose which you have indicated, which was a large difference between daytime-work and night time rate? A. I would say this, sir, that the fact that you had a large rate would, in the first place, create in my mind a presumption that it is not a shift differential.

1128

The Court: What Mr. Goldwater is trying to elicit from you, Professor Taft, if I may come to somebody's rescue— I don't know which—is whether you are excluding large payment by definition. Of course if you are we are no place at all. Do I correctly construe your question?

Mr. Goldwater: Yes, exactly, your Honor.

The Witness: Oh, I see. I would say this, that on the basis of the cases I have here taken from the reports of the War Labor Board, I find only one case where a shift differential was more than 15 cents on the hours. As a rule they are 3 and 5 cents, 5 and 10 cents, that is for the second and third; and, consequently, if I saw this larger differential I would have to examine it, and unless the evidence were predominantly on the other side



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1129

I believe that I would assume that it was an over-time rate.

Q. You say in examining the War Labor Board cases you find no case in which a shift differential was more than 15 cents an hour; is that right? A. Yes.

Q. That presumes, therefore, that you must first find that the case is a shift differential case, and then see what is paid; is that right?

The Court: He means that you first have to have a tag on each one of those cases, labeling it shift differential, because you can say that all shift differential cases were only 15 cents.

1130

The Witness: Oh, I see the question.

A. That is true. That is where the problem comes in. The reason I mentioned these cases is because the question of payment for different shifts was an issue in dispute.

The Court: If you say that all six-legged creatures are insects you are not telling us anything if you define all insects as six-legged creatures. If you say that all shift differentials are 15 cents then you are not telling us anything when you say there is no shift differential in excess of 15 cents.

1131

Mr. Taylor: May I get in my two cents at this point?

The Court: We are dealing with inflationary economics.

Mr. Taylor: I think that the confusion, if there is any confusion, arises from the definition by Mr. Goldwater of what he means by shift differential.

Mr. Goldwater: I thought that is what you produced this witness for, Mr. Taylor. I did not think I was supposed to testify to it for you.



1132

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Mr. Taylor: Isn't it quite clear that the witness, in talking about shift differential cases is talking about cases where there jolly well are two or more shifts? Mr. Goldwater is trying to drag in cases where there is a higher rate of pay for one time than another. We will never meet on any such basis as that.

Mr. Goldwater: I have not gotten to any such basis as that. You wanted the witness now, so I think he is probably prepared, if he was not before.

1133

Q. Now, Professor, what I am trying to get at is whether we are not up against the egg and the chicken here. Which comes first? Do you determine first if there is a shift differential and then look at the hours and say, "Now, that is a shift differential because it is 10 or 15 cents", or do you look at the case and say it is 10 or 15 cents. Now I know it is a shift differential!

A. Let me put it this way: How do I know that this is a shift differential? First of all, every one of these cases that came before the Board had shifts.

1134

The Court: You mean more than one?

The Witness: More than one shift.

The Court: Working period.

The Witness: That is right, more than one regular working period, beginning at a particular time and ending at a particular time, the second shift designated as beginning and ending at a certain time, or sometimes the third shift. So that was the first test, that they were actually regular shifts. Now what is the second? How do I know it is a shift differential? First, because the collective bargaining agent—all of these are dispute cases—came in with a claim that we are entitled to more



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1185

for shift 2 and shift 3 than we are on shift 1, and gave these reasons that I have enumerated; and, therefore, the dispute was over a shift differential, whether you are entitled to more pay on the second and third shift for doing the same type of work than you are on the first. So I knew it was a question of shift differential, because the problem was whether there should be a wage on one shift in excess of the other, and—well, I will stop at this point, sir. I do not want to be longwinded.

Q. And you say that this industry, the longshoremen's work, has a characteristic that you have not found in any of the cases which you have examined, to wit, the characteristic of the shape-up three times a day; isn't that right? A. Well, I answered yes.

1136

Q. It has been called by one of the defendants' witnesses here a unique industry in that particular; would you agree that it is unique?

Mr. Taylor: In what respect?

The Court: In the daily shape.

A. In the daily shape, yes.

1137

Q. Now, does this shape three times a day tend to irregularity of work, or is it the irregularity of work in your opinion that requires the three times a day shape?

A. The latter.

Q. You have said that a rate of pay is determined by several factors, and in answer to one of his Honor's questions you enumerated a number of factors. A. That is right.

Q. I noted that you did not include the time of day worked as a factor; was that consciously done? A. Yes, sir, it was consciously done.



1138

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1139

Q. Don't you think that the time of day worked is a factor which enters into the rate of pay which is paid per hour? A. If I may qualify my answer, when we speak of a rate of pay we have reference to the basic rate that is paid for a job. Then if a person works other hours, and he usually regularly works other hours, he is usually or at least frequently, though there are many cases—right here I have a number of cases where the shift differential was denied completely because it was not industry practice, and the difference between working 4 to 5 and 6 to 7 is not fundamentally different. There is some disturbance to family life for which a person receives a slight compensation, but it is not any different. If you are a carpenter you do the same work. The content of your job is pretty much the same. There is some slight difference, but you are not doing a different job.

Q. Do you think that the time of day when the work is performed enters into the mind of the workman in determining whether he will accept a job at a given rate of pay? A. Why, of course, most anything is likely to.

Q. Is that a particular factor? A. I would answer your question, yes.

1140

Q. May I ask you now, Professor, to apply his Honor's term of old-fashioned economics, whether the question of supply and demand has any bearing upon the rate of pay after 5 p.m. in the stevedoring industry, in your opinion? A. I would say this, that the supply and demand factors in the stevedoring industry, that is the supply of labor and the demand—the demand for labor, of course, is influenced by the fact that after a given hour the differential is very high. In other words, employers are not likely to demand as much labor at \$1.50 as they would at \$1, and that is actually the purpose of that. Now, the supply of labor I should say is not appreciably affected. In other words, you can get as many people to work, and



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1141

if you get different shifts, as you do in manufacturing, you very likely could get people to work for a very slight increase in their daily rate. The demand for labor is very much influenced, I would say, by the fact, and that is exactly the intention. It is to discourage the demand for labor at those periods. That is the purpose of the time and a half.

Q. Do you know that there has been testimony from no less an authority than Mr. Ryan in this case—were you in court, by the way, when he testified? A. No, sir.

Q. There has been testimony by Mr. Ryan, here, who is the president, as you know, of the International Longshoremen's Union? A. Yes.

1142

Q. That the men never wanted to work nights.

Mr. Taylor: Well, I think that is stretching it a little bit.

Mr. Goldwater: Shall I find the record for you? I will find it for you.

The Court: Well, what is the difference?

Mr. Goldwater: Page 221. "Men objected to working outside the normal daylight hours", is Mr. Ryan's statement.

Mr. Taylor: That is not what you said.

1143

Mr. Goldwater: That is what Mr. Ryan said.

Mr. Taylor: Yes, but what you said he said is not what you just read.

The Court: Very well; now that we have the quotation, what about it? Put your question?

Q. And did you, in the study of the conditions in this industry, Professor Taft, learn that the companies which paid the freight also did not want night work? A. I can very easily understand why the company would not want night work, and the company does not want—



1144

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Mr. Taylor: He has not asked you that.

Mr. Goldwater: I do not know why you should object to his making his answer as broad as he wants.

Mr. Taylor: All right, I move to strike out the answer as irresponsible.

1145

The Court: Only the person who asks the question may move to strike out the answer as not responsive. I will demonstrate to you by a simple logical proposition, that otherwise it does not mean anything, because if you will strike it out he will then ask the same question and get it responsively.

Mr. Taylor: O.K.

Q. And did you learn as a fact that the employers did not want night work; is that right? A. Yes.

The Court: Because of the penalty provision?

The Witness: That is correct.

The Court: In the absence of the penalty provision they preferred night work, so you testified earlier in the day.

1146

The Witness: That is right; and, moreover, on this point the union imposed a penalty in order to prevent night work, in order to discourage it, and I suppose when Mr. Ryan was talking he was talking—

Mr. Goldwater: I object to the witness telling what he supposes.

The Court: Objection sustained.

The Witness: I am sorry.

Q. Did you mean that in the absence of the penalty provision the companies would prefer night work? A. I did not say prefer. I would say this, that if you remove the overtime provision, and in view of the fact that it is



to the interest of any employer to have his work done as rapidly and as expeditiously as possible, that you would encourage people, employers, working at night. Otherwise there would be no point in imposing that provision.

Q. Now, let me ask you this, Professor. Here is an industry in which the men did not want to work nights, and that condition—the witnesses for the defendants have testified—has existed, you might say, almost from time immemorial in the industry, for 60 or more years; and in which, because of what you call the penalty provision, the employers did not want to work nights; and in which, as you say, the purpose of the penalty provision was to discourage and to inhibit night work. Can you explain to me now why, after 60 years of these continuing conditions, all of them, night work has persisted in this industry? A. Well, night work and overtime work takes place in every industry, despite the opposition of both the men—now, when we say the opposition of the men, it usually means perhaps a majority of the men. There are people that are willing to work unlimited hours, and those barriers are erected against them working and against the employer working them at straight time rates.

1148

Now, every industry has occasions where certain jobs have to be done. There is a certain amount of work that has to be gotten out, irrespective of cost. There are some occasions where a small amount of work will free a vessel. There are all sorts of reasons that arise why overtime must be done. In other words, while it will normally discourage work, there are occasions where unless it were done the employer would suffer great losses.

1149

That is the reason, sir, that overtime is never prohibited. Even in the most stringent type of union clause on that question there is always a qualification that overtime will be worked with the permission of the business agent, and upon proof that an emergency existed. I know of no



1150

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single contract where it is absolutely prohibited, and that certainly would be a very foolish clause, I would say.

Q. Do you know of any contract which provides, as this one does, and has for many years, that night work must be worked at the direction of the employer? A. Yes, sir.

Q. Will you tell me which ones? A. I have a contract here. I cannot put my finger on it. I did not anticipate your question—where it states that if the employer requires overtime work it had to be done. Overtime has to be performed when he wants it under emergency conditions.

1151

Q. How many such contracts have you found in your examination of, you said, I think, about 300 cases? A. Well, I have looked over more than 300 contracts.

Q. In connection with this study? A. I would agree with you, sir, that not many.

Q. How many, do you know? More than the one which you mentioned? A. Let me put it quite generally; several.

Q. Are they all in the same industry? A. No.

Q. What industries are they in? A. One I ran across I think is the carpenter's contract; another one a warehousing contract, and the others I do not recall, but I will grant that there were not many.

1152

Q. Do you think you could find those during the recess hour? A. I could only find one, the others I do not have with me.

Q. Will you find that during the recess hour? I should like to see the contract if you have it. A. All right, I will try.

Q. Did you learn from your study what the average year-in and year-out, month-in and month-out run of the mill percentage of night work was to the total amount of work in the stevedoring industry in the port of New York? A. I did not do that directly, but I kept in touch



with that job, so I know it largely through the work of Dr. Smith.

Q. What did you understand it to be? A. 17 per cent.

Q. Did you understand that the percentage, whatever it might be, continued almost uniformly for the last 20 years or so? A. I do not understand that, but I can say—I do not know that. It has not been told me.

Q. There has been testimony to that effect here. A. Well, I was not here.

Q. Will you assume that. A. Yes.

Q. Will you assume that which I tell you was the testimony here? A. Well, I accept it.

1154

Q. Tell me whether you think now that the purpose of inhibiting this night work was served by the rate required to be paid, the penalty rate as you describe it? A. Yes, I do. I regard that as a very small proportion of the total work.

Q. Do you know who has to foot the bill for that extra compensation that is paid for night work? A. I presume the employer.

Q. You mean the stevedore? A. Or the shipping company.

Q. There has been testimony that that extra cost is passed on to the shipping company, and that is without contradiction here. Do you know that it has been established by the defendants in this case that no night work can be done without the permission obtained by the stevedoring company from the shipping company? A. I will accept that as a statement of fact.

1155

Q. Would you say, then, that under those circumstances there is or is not night work done, depending upon the profit which the shipping company can see by measuring the cost of the night work against the cost of permitting its ship, which is its instrument of earning, lying idle in the port? A. Why, of course that is the whole crux of the



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1156

problem, but it seems to me that when you increase the rate 50 per cent what you are trying to do is to make night work as unprofitable—for example, if a company has two hours of night work and by clearing the ship it will be enabled to save in time and in earning power an amount larger than the cost of working these people these two hours, of course the ship would go; that is the only test of any economic decision. It depends on comparing whether a person makes a particular economic decision; in doing so is dependent upon his comparison with his costs in one situation with his revenue or with his costs in another.

1157

Q. That is in the last analysis what dictates whether there shall or shall not be night work? A. Of course that is what dictates it, and the union has attempted to make it expensive by imposing this penalty rate. I would agree with your contention.

Q. And you would say that in spite of the fact that the ultimate objective was to inhibit night work, which in its logical conclusion is to do away with night work, that notwithstanding the fact that it has continued almost unabated in percentage over a period of 20 years, this penalty, as you call it, has served its purpose? A. I certainly do, because under other circumstances the amount of night

1158

work would be appreciably decreased.

The Court: You mean increased?

The Witness: Increased; because after all you have the ship tied up, and certainly the company would have to bear its costs, which would be the same at any point. There would be no reason why the company should not work the men around the clock if the penalty were removed.

Q. Is that so, Professor? Are you sure that there are no other considerations? A. Well; I don't want to be too cynical, so I don't want to say that people are cruel and brutal, and that there are no—



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1159

Q. Oh, no. I am talking of the material considerations, not these abstract things that you are describing now.  
A. Of course efficiency may not be as high under some conditions.

Q. Oh. And accidents may be higher? A. Well, they might, but whether they are or not of course is an empirical question.

Q. You would not agree then with your bible here, Mr. Barnes, would you? He thinks it is not empirical at all.  
A. That was in 1915.

Q. Oh, I see. Well, is there anything else that is antedated or outmoded in this book? A. I quoted an historical statement, that is all that I did. I did not—

1160

Q. I see. Not as authority for the fact which the statement described. A. Well, I don't doubt that what he said was true in 1915.

Q. You don't doubt that the statement you quoted was true?

Mr. Taylor: Which statement are you referring to, Mr. Goldwater?

The Court: There is only one question. You have it in the record.

Mr. Goldwater: I think the witness understands.

1161

Q. Don't you?

Mr. Taylor: Oh no. Mr. Goldwater is referring to a statement that the accidents were greater—

The Court: That we have not heard yet. There is only an intimation that such might appear in the book.

Mr. Taylor: That is all right. I wanted to get across to you and the witness that he still was not—

Mr. Goldwater: The statement is that at night all these dangers are increased; the light is less adequate, the signals are not so readily understood;



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*Philip Taft—For Defendants—Cross.*

there is usually a weariness from the day's work just passed; men are likely to relax their usual caution, and so on and so on.

Q. You understood what statement I was referring to, didn't you, Professor? A. Well, I will again repeat that I accept that statement as true in 1915.

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Q. Then you will accept the statement only as true in 1915 and not as true now, with respect to round-the-clock operations? A. Yes, sir, and if I may be permitted—I don't know whether I am in order or not—the reason that I say that it may be true in 1915 and not now is because there has been very substantial developments in safety in the last 30 years. For example, compare the accident record of U. S. Steel in 1915 and in 1945, and you will receive a very, very substantial difference. So I won't challenge the statement in 1915, but I must say that I don't know about 1946.

Q. Have you examined the accident record of this industry in 1915 and compared it with 1946? A. No, I have not, sir.

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Q. You don't know anything about the incidence of accident in this industry? A. No, sir.

Q. Or the reasons for your opinion of the accidents in this industry, or the incidence of it, technological or are they inherent in the work itself? A. Well, I don't know the magnitude of accidents? I am sorry, but I can't answer your question, and I am not trying to evade. I just don't know.

Q. Now you said, Professor, in your testimony yesterday, that you examined a number of cases, 300 or so, if I recall. A. Of contracts?

Q. Yes. I am not clear whether you meant contracts, separate contracts that you examined, or whether you were talking of various industries. Will you clear that up



for me? A. With respect to what, sir? I don't understand your question.

Q. With respect to the studies that you made in preparation for your testimony here. A. Oh, I examined contracts in other industries. May I say that I always look at them, but I made a special point to examine them with respect to the overtime provisions.

Q. Now, how many industries were covered by these 300 cases? A. Well, I don't like to make a guess. I looked at most of them in the Littauer Center at Cambridge, Massachusetts, and I grabbed out a batch of contracts and looked for the overtime provision and the hours provision, and I never really made a note of them. I looked over these particular contracts and I enumerated the particular industries they covered. 1166

Q. When you say you looked over these contracts, I don't know which ones you are referring to. A. I am referring to these that I have right here (indicating).

Q. Those that you have with you here now? A. Yes. I looked over these, and some additional ones that did not have the particular—

Q. How many of these contracts have you here with you now? A. Well, I don't know. 1167

Q. Oh, roughly. A. Well, there are about 20.

Q. What industries do they cover? A. Well, I enumerated them.

Q. Are these the ones— A. I enumerated what they covered. I will do it again.

Q. All right. A. They cover the carpenters, the lithographers, steamfitters, sheet metal workers—

Q. Was that the list that you gave us this morning? A. Yes, that is exactly it.

Q. All right. A. Some of them are duplicates, that is, they are in the same industry, in the same trade.



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*Philip Taft—For Defendants—Cross.*

The Court: We will suspend now until 2.15.

(Recess to 2.15 p. m.)

**AFTERNOON SESSION.**

**PHILIP TAFT**, resumed the stand.

Cross Examination continued by Mr. Goldwater:

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The Witness: I have these two, I found two, and I believe there is another one there which indicates that, sir.

The Court: Two contracts?

The Witness: With overtime having—one is clear, and the other has a requirement of work at a specific time.

The Court: That is in response to Mr. Goldwater's request before the recess.

The Witness: Yes.

1170

Q. That was at my request that you find the contracts in which there was a provision that overtime should be performed at the direction of the employer? A. That is right. This is a requirement that certain hours have to be worked at the request of the employer, but they are not defined.

Q. To save time, do you mind if I have these looked at by one of my associates while we are proceeding? A. Fine.

Q. My attention has been called to the fact that I may have misunderstood your answer to one question or assumed an incorrect answer to one of the Judge's questions in my follow-up, and I would like to point to the question involved and see whether I understood you correctly. A. Yes, sir.



Q. Did you say that you found one case in which the shift differential was more than 15 cents or that you found no case in which the shift differential was more than 15 cents? A. No. I said that I found one case, I stated that I believe yesterday too, that it was the lumber case in which the shift differential was defined as more than 15 cents.

Q. My question was this morning; and you had reference then to the instance of the lumber case which you mentioned yesterday. A. Yes, that is right, sir.

Q. I recall the lumber case distinctly. A. Yes.

Q. Now will you tell me whether is a point at which the ration of the time worked which is not in the regular or normal day at a rate fixed, whether there is a point in the rate at which you would say that that determined whether it was overtime or shift differential? Do I make myself clear? A. Yes, sir, I believe I understand the question. As I understand your question you are asking whether there is a specific point at which the character of a rate would be changed, that is a difference in the rate, would be changed from a shift differential to an overtime rate. Is that the question you ask?

Yes. A. Well, I should not like to be too precise and say that this here point (indicating), as soon as you reach this point, for example, you are within the city limits of an overtime rate. I don't believe I would be prepared to say that. I would seem to me that the test is largely general experience and general practice, and may I say that that is about all that one would say. If the difference is small there is a presumption that it is a differential, shift differential. If the difference is large there is a presumption that it will tend, or the purpose of it is to inhibit work. And then, of course, unless there were a preponderance of evidence in the contrary direction I would stick to those definitions.



1174

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Q. There is no point then at which you could say that the presumption is irrebuttable? A. In the absence of any other evidence I would agree with that. But I would say that in every case other evidence would exist.

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Q. Well now, let me take the example which his Honor gave you in one of his questions. He asked you to assume a day rate of a dollar, a night rate of \$1.10, and he asked you would you call that shift differential. You did not ask for any other facts there. You said, definitely, "differential." That was your answer in that case. Do you want to modify your answer in any way? A. No, sir. I would say that in view of the fact that normally that small difference in the rate can be offset by the spread of overhead as a result of greater operation, I would be inclined, unless there were very important, or significant evidence to the contrary, to assume—if you gave me only those facts, as I have said, those facts certainly would not exist without other facts; I would assume that it is a rate differential. I stick by my answer.

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Q. Your answer did not encompass what you are now saying. You did not in answer to his Honor's question say that you wanted the other facts surrounding the case. You answered promptly, "shift differential." I am asking you now whether you want that answer to stand that way or is this later explanation to be considered a modification of that? A. Well, I don't believe it is a modification because I cannot conceive of a situation where a rate of wages stands by itself. In other words, there are other considerations; you have to consider the other facts. And the other facts would be trying to determine: Is there a shift? For example, if there were no shift at all.

The Court: Supposing you had a wage scale which said 40 hours a week at a dollar a week, anything over 40 hours \$1.10 a week? Would you



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call that overtime or would you call it shift differential?

The Witness: Well, there are no shifts there?

The Court: No shifts.

The Witness: And, then, if the industry were of such character that a 10 per cent increase in labor costs was sufficient to inhibit work, I would have to regard it as overtime. If it were of sufficient importance. But our experience indicates that normally it is not of sufficient importance.

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Q. Now, are you talking of the facts and circumstances of the particular industry in that examination to determine whether it is a shift or overtime or are you talking about the general circumstances of industry? A. I would say that it would be true in general, and experience demonstrates it is true particularly.

The Court: Suppose you had an industry which could well afford to pay \$1.10 an hour but the men are only moderately organized, and the best they have been able to get from their employer is an agreement calling for a dollar an hour for the first 40 hours, and there is a provision that for all hours in excess of 40 the employer shall pay \$1.10, that that is the result of a strike of 30 days duration, and finally that is what they agreed on. What do you call it then?

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The Witness: I think that would be an overtime rate, providing of course the change, the effect, had no—the increase in rate had an inhibitory effect or tended to have that. I believe with your example it would be an overtime rate.

Q. Now you said that apart from the lumber case the



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*Philip Taft—For Defendants—Cross.*

highest shift premium pay that you knew of was 15 per cent. A. 15 cents.

Q. 15 cents, I mean, per hour. A. That is right.

Q. Do you know of the situation in the baking industry in this area? A. I do not, sir.

Q. Will you assume now that in the baking industry contract in this area the pay for night work at 25 cents per hour? A. Over?

Q. Over the regular day rate.

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The Court: What is the regular day rate? If it is 50 cents that would make it a 50 per cent ratio.

Mr. Goldwater: I appreciate that, your Honor.

Q. You talk in terms of premium per hour when you speak of 10 or 15 cents per hour; isn't that so? A. That is right; 10 or 15, or 15, 10 per cent; something like that. Yes.

Q. Well, will you assume that in the baking industry in this area the A shift—

Mr. Taylor: The what?

Mr. Goldwater: A shift.

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Q. —which has not the regular daily hours of employment pays 30 cents per hour and that the rate per hour for normal work is approximately a dollar. What would you say as to that pay? Is that overtime or is that shift premium?

Mr. Taylor: May I inquire whether this is based upon a factual situation or an assumption?

Mr. Goldwater: It is based on an assumption. I have said so. I said "assume that."

The Court: A hypothetical case.

Mr. Taylor: It is purely a hypothetical case.



A. I am sorry, sir. I did not follow your question.

Q. Will you assume that the rate of pay per hour for day work is approximately one dollar, and that A shift for other hours of employment in the 24 hours of the day has a premium of 30 cents per hour. Would you call that overtime or shift premium? A. Well, my answer there would be that you are approaching the twilight zone between the two types, the two types of premium or differential.

Q. Now, that is what I wanted you to tell me, where that twilight zone is, either in percentages or in cents per hour with relation to what you might call the basic day rate. A. Well, I would say that as you begin to approach the 50 per cent premium you are approaching an overtime rate. We derive it from the fact that overtime rates are generally at time and a half and that shift premiums seldom come within a very large area of approaching 50 per cent. Now, I should not want to exclude every case, but certainly it is conceivable that special conditions may be met in a special manner. But I would say that when you approach a 50 per cent premium you are approaching the overtime rate, a very definite overtime rate.

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Q. Well, now, when do you begin to approach it, according to your definition; in the scale of between one cent or one per cent, if you wish, up to 50 cents or 50 per cent? A. Well, I don't think I could answer that precisely.

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Q. Well, as a matter of fact you continuously approach as you increase 1 per cent from 0 up to 50, don't you? A. That is right, you are approaching. But the question then is you have two types of compartments, and when are you in one and when you move out of that into the other compartment?

Q. That is what I am asking you to tell me, Professor.



1186

*Philip Taft—For Defendants—Cross.*

A. Well, I have attempted to say that the idea of overtime is to inhibit, and generally 50 per cent is regarded as adequate to act as a means of deterring work out of regular hours. There are occasions where a double time penalty has been imposed, because it was found that the time and a half rate was not sufficiently effective. That is about as well as I could do.

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Q. Well, in the case in which a 50 per cent rate was not found to be effective, would you still say that the 50 per cent was overtime? A. I would be inclined to say it was overtime unless I could see a considerable amount of evidence there and the actual existence of organized shifts.

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The Court: Professor Taft, if you were a physical scientist instead of a social scientist do you think that your thinking might have moved in an entirely different direction on the basis of the data that you have assembled, and thinking in terms of physical as opposed to sociological factors and in physical terminology would you not say that every premium is a force or factor composed of two—what do you call them—vectors; one to constitute the element of excessivity and one to constitute the element of abnormality in terms of time, and that the net result is a composite of the two, the relative proportions depending upon the circumstances that you have just described?

The Witness: I would just like to add one point. I agree to that, sir, but in the question of shift differential it seems to me it is important to recognize that the extra compensation is offset by the employer in terms of higher operating rates, where the overtime rate is that high, where the spread of his overhead is not adequate, will not compensate him for that extra payment, he increases his labor



cost to a greater degree than he decreases his overhead, and in the case of a true differential you have the very opposite result:

By the Court:

Q. Well, I agree with you. We must always assume that if we are dealing with economic assumptions, that they would not engage in overtime unless there was profit in that operation as well. A. That is right. The difference is, of course, that all conditions are not foreseeable or controllable, and economic events take place independently of the individual to some degree.

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Q. Sometimes industries operate at a loss? A. That is right, and he has to make allowance in order to hold his customers, or because something has happened.

Q. But he feels that as an overall picture it is desirable for him to persist rather than to abandon? A. That is right, rather than to lose his business or trade he will stay there, but as a normal operating circumstance that will not be valid.

Q. After you said that you agreed with me, with any analogy to the physical sciences, but would not it lead you to quite different answers in specific situations, which I think you can see if you apply the specific illustrations. For instance, in the case of a man who works out of time, but only the established total of hours, the factor there of excessivity would be zero, and the factor of time abnormality would be 100 per cent. In the case of a man who works the stipulated regular hours and in addition works hours in the overtime period, there you would have both factors involved; that is, both the factor involved in working at the wrong hours, and the factor of working excess hours, the unions desiring to curtail both. A. That is right.

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*Philip Taft—For Defendants—Cross.*

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Q. Then you come to the reverse situation, where a man works all abnormal hours and then works overtime during normal hours; that is, a man who regularly works at night, but then, when his overtime comes along he works during the day shift, that can happen, too; and there you would have 100 per cent abnormality and possibly a minus quantity of the other vector, or at least zero. You would have excessivity for his overtime period without any abnormality in time for his overtime period. Might not that result in different answers as to whether a particular premium was paid as a shift differential for overtime, and might not your answer be in many cases that it is a composite of both? Let me just follow up with one more question. Isn't it really historical association which has resulted in treating as one such factors as working over 40 hours or as working over 50 hours, or whatever the stipulated week may be, and such factors as working on the 4th of July and Christmas? A. Yes, but the premiums introduced, sir, are designed to prevent people from working at those times when the majority do not wish to work.

1194

Q. That is right. A. You have a 4th of July premium, because the great majority of people do not want to work the 4th of July, but there are people who do, and if they worked they might make it impossible for the others to enjoy their holiday for competitive reasons.

Q. I can follow all that. A. Yes.

Q. But I say isn't it really historical? In the facility of expression it is easy to say in a contract that for work on 4th of July, New Year's Day and Christmas, and for working over 40 hours a week there will be time and a half, but that actually you are dealing with different situations. You are dealing in once case with a desire to moderate the amount of work, perhaps to spread the work, perhaps to increase standards of living, and in the



other case you want to do something a little different.

A. Well, I would say that the drive behind the various limitations that have been imposed for that have differed throughout our history. In one case, just as you stated, you have the desire to improve standards; and in the other to spread work; but the means by which that is different seem to me to have been uniform.

Q. The penalty payment? A. The penalty payment; that is right, sir.

By Mr. Goldwater:

1196

Q. Now, Professor, will you tell us why, from your investigation in this industry, there is now still night work in the industry? A. Well, I believe I have already stated it, that these are unusual situations. When an employer compares the losses that he would undergo by having a ship lay over with the losses, or with the increase in his expenditures as a result of overtime payments, he, if he were acting purely as an economic man, would take or make the decision which would either yield the highest returns or yield the smallest losses. In other words, he is carrying out his business. Those are the motivations for all business, and he is acting as a business man. If he cannot arrange his work to eliminate that factor at times he has to pay overtime.

1197

Q. And where that overtime, as you call it, this pay at a different rate for a time not worked in what you describe as regular day hours, continues over a long period of years, is that an indication to you that work at those abnormal hours is a regular incident to the character of the business in which he is engaged? A. I would not go that far, because you find overtime in the construction industry. The only industry that can eliminate the possibilities of overtime is a round the clock industry,



1198

*Philip Taft—For Defendants—Cross.*

with three shifts, and even that would not be able to for its maintenance people.

Q. Do you find it in the construction industry with the same degree of regularity over a period of 20 years as you find it in this industry? A. Quite frankly, I do not have the figures for the construction industry. I know that the overtime is worked there.

Q. You do not know whether you find it with the same degree of regularity? A. I do not know.

1199 Q. Then it is not a comparable situation? I mean, do you think that you should cite the industry in which you have no figures as a comparable situation? A. No, I was not citing the industry for the purpose of indicating that it had the same ratio of overtime to straight time. I was simply indicating that industries cannot control their overtime work, except within limits. They can within limits, and that differential is designed to control it within limits, not to prohibit it. There is no industry that prohibits overtime, that I know of.

1200 Q. You do not know the figures in the construction industry which you have mentioned? Do you know the figures in any industry in which there is overtime at the same degree of regularity as you have found it in this stevedoring industry? A. No, sir. As a matter of fact, while I know that overtime exists—otherwise it would not be written in the union contracts—I could not tell you the amount of overtime that is worked in any industry, because I do not know and it would be a difficult problem to procure figures upon.

The Court: You are a considerable distance away, I think it is, from 7 or 7(a). I do not know how much further you want to go from that.

Mr. Goldwater: I do not want to get much further away from it, your Honor. The witness's



*Philip Taft—For Defendants—Cross.*

1201

answers compel me. in searching for his reasons for definitions to ask further questions.

The Court: I do not want to curtail your examination.

By the Court:

Q. Do you say, Professor, that the economic factor of establishing a 50 per cent benefit for a period of work in excess of a stipulated period is to discourage employment during that extra period? A. Yes.

Q. And you would also say in the converse that in order to discourage employment for that extra period you have to impose a penalty? A. You have to impose a penalty, yes.

1202

Q. You are familiar with the Wage and Hour Law, I take it? A. Yes, I am reasonably familiar.

Q. And the statute is designed to accomplish that economic effect? A. Yes.

Q. To discourage employment in excess of 40 hours by imposing on employment in excess of 40 hours an employment charge? A. Yes

Q. Supposing you have a situation in which an employee working at night for 40 hours a week gets paid X rate; how do you accomplish the desired discouragement from having him work an additional 10 hours, or having the employer employ him for an additional ten hours, unless you impose a penalty for a certain extra period? A. I would say that normally that condition of a man receiving time and a half over the first rate is not likely to exist.

1203

Q. Supposing you find that it does exist? A. Well, I would say that he was receiving the overtime rate due to this fact, that the concept of overtime—

Q. I will agree with you, he is receiving the overtime



1204

*Philip Taft—For Defendants—Cross.*

pay for the entire 40 hours, and apparently his employer finds it satisfactory or economically desirable to employ him and pay him the overtime rate for the 40 hours that he works. Now he wants to employ him the 41st hour, and you now have to call into play a restrictive force; isn't that true?

Mr. Taylor: May I ask how often you are assuming this thing happens?

The Court: Once.

1205

Mr. Taylor: Oh, just once.

The Court: That is all we are talking about. A man works 40 hours a week at the abnormal period of time, so that is getting time and a half for each hour of the 40 hours. Now he has worked the 40 hours. He works an additional ten hours. Now your problem is to inhibit or retard or discourage the employer from employing him an additional ten hours. How do you do it?

Mr. Taylor: I object.

The Court: On what ground?

1206

Mr. Taylor: On the ground that the question of what may be done in a particular instance of that sort, the answer to that sort of a question on that sort of a hypothesis is not going to assist us any in solving our problem here. Our problem is how frequently do you have night work of that character going on, and what is the thinking and purpose of the parties with respect to its frequency.

The Court: No, I am assuming that the only plaintiff here was one plaintiff who was operating on an individual employment contract.

Mr. Taylor: For one week?

The Court: For one week, or for one year, I do not care, under which he gets \$1 an hour and \$1.25



*Philip Taft—For Defendants—Cross.*

1207

for day work and \$1.875 if he works after 5 o'clock, and it so happens he always worked after 5 o'clock, or for a period he worked after 5 o'clock, so that he actually has been collecting \$1.875 an hour. Now here is what I want to get, a Congressional construction: That is what I am asking this question for. Assuming Congress wants to discourage employing that man for a period beyond the first 40 hours, what would an economist advise Congress to do?

Mr. Taylor: I object. I think it is a conclusion for the Court and not the witness. I think you are posing purely a legal question.

1208

The Court: I will reserve decision on your objection and let him put the answer on the record.

The Witness: Well, your Honor, I believe that your question is very unrealistic, because I cannot envisage, economically speaking, a situation of that kind arising.

Q. Supposing you were told that in this record situations of that kind exist, then you would have to say that it is not utterly unrealistic? A. That is true, sir.

Q. Supposing you assume, as I think the evidence may show, that some longshoremen always work at night, never work by day. A. I think that I would conclude from that, sir, that the condition was an abnormal one, and that where it existed there were either some special circumstances or some very unusual situations, and I think that I would still be inclined to retain the concept of overtime that has been developed, over a long practice, that overtime can be defined in these two terms, which I have done.

1209

Q. If I am going to translate your answer to try to make it responsive to my question, you tell me whether I am right, would you say that in order to accomplish



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*Philip Taft—For Defendants—Cross.*

this inhibiting force you would not need any further penalty? A. I believe that, sir.

Q. In other words, you are suggesting that under those circumstances no further discussion is necessary, that there is a discouraging factor in every minute of work? A. I believe, sir, that in view—the time the law was enacted, and I have no right to say that in the courtroom, but I believe that the idea was to spread employment, and a condition of this kind, if it existed there would be no need to inhibit further restraint on employment.

1211

By Mr. Goldwater:

Q. Professor, I would like to call your attention to the situation which his Honor asked you to assume this morning, a situation in which an industry had a rate of pay, a fixed hourly rate of pay, and in which there was pay for more hours than the hours actually worked; do you recall his Honor's question?

The Court: I do not recall it.

1212

Mr. Goldwater: Your Honor assumed a case, or I asked the witness to assume a case in which there was pay at, we will say, eight hours for six worked.

The Court: If I am thinking of the same example that you are thinking of, I assumed that the contract stipulated six hours as the normal day, but actually the intention of the parties was to work eight hours, it being the intention of the parties that the employee should earn for the eight hours a day.

Mr. Goldwater: I think your Honor added "the intention of the parties" to the question. I do not say that your Honor did not say that this morning. I say your Honor added it to my present question, the "intention of the parties."



*Philip Taft—For Defendants—Cross.*

1213

The Court: You want to eliminate that?

Mr. Goldwater: No, I am perfectly willing to leave it in.

Q. Do you recall the question? A. Yes.

Q. In answer to that you said you knew of no case? A. I believe that I answered that it would constitute a disguised wage increase.

Q. But you know of no such case? A. I believe that the Pacific Coast Longshoremen industry may fall in it. I did not think of it at that time, but I was not trying to hide it. I just did not recall it, at that time.

1214

Q. Do you happen to know of the Pacific Coast air frame industry case? A. I remember the case very vaguely. I remember that it was a very important case before the War Labor Board, and I do not recall the details, but I may if you refresh my memory.

Q. Perhaps I can refresh your recollection. A. Yes; all right, sir.

Q. You recall that that was a case in which for hours outside the regular hours there was a 10 cent per hour premium, which was in addition to eight hours pay for 6½ hours work?

1215

Mr. Taylor: I do not think that is an accurate statement.

A. I do not recall those details, but I am not questioning you.

Q. Well, we will try to find it. A. I may have it.

Q. Are you familiar with the Monthly Labor Review? A. Yes, certainly. I probably have it myself, but I will accept your question, sir.

Q. I will ask you to look at this statement in the Monthly Labor Review, on page 346 of the August, 1944, issue, Vol. 49, No. 2.



1216

*Philip Taft—For Defendants—Cross.*

The Court: Have the record show it was published by the Department of Labor.

Q. Have I correctly quoted the terms? A. That is right.

Q. I have? A. That is right.

1217

Mr. Taylor: I merely want to make sure that if this witness be interrogated on the assumption that that contract is of a certain character, that Mr. Goldwater tell him all of the essential ingredients of the contract. One is that you have a true situation and regularly established shifts—

The Court: When you are dealing with a witness as expert as the witness we have on the stand, I allow counsel very much more leeway in not stating such facts, on the assumption that the witness is able to fend for himself, and if there be some factor there which is omitted, that the witness will call our attention to it, but should he fail counsel is always there to back him up on redirect. That is a Siegfried Line behind which we never withdraw.

1218

Mr. Taylor: This is not supposed to be a hypothetical question. This is supposed to be an actual case, and it is not improbable that the witness might be influenced by the assumption in the question that he is being given an actual case.

The Court: The witness looked at the record. If that factor is important the witness will, of course, call our attention to it.

Q. Professor, I am unable to tell you at the moment what the hourly rate of pay is. But can you tell me, apart now from the 10 cents per hour which would indicate a percentage of the regular rate per hour, or the rate



for regular hours, we will say, what the translation of 8 hours pay for  $6\frac{1}{2}$  hours work would mean, just that element, in terms of percentage?

The Court: In terms of percentage?

Mr. Goldwater: Yes.

The Court: You want to know the mathematical answer. Ask one of your associates to ascertain it.

Mr. Goldwater: I have done it.

The Court: What is the percentage?

Mr. Goldwater: It is 23 per cent; I am told.

A. Let me elucidate on that question. It seems to me that there is one issue that I should like to answer, and that is, first of all, that there are two shifts. Now, the situation there seems to me to be very simple. It is difficult to get people to work in that industry; a high labor turnover. 10 cents was given for the second shift. Now, that in itself is a very high shift differential. It is 2 cents above that—the maximum suggested or ordered by the Stabilizer for the third shift. Now, therefore, if you are going to get people on the third shift, if you give the second shift 10 you have to give something to the third. And there you really have the thing working out in the same way as an ordinary two shift.

Q. So you have indicated that the difference between the second shift and the third shift is  $23\frac{1}{2}$  per cent.

A. Well, in that case—

Q. What does it compensate for? A. Well, the one thing compensated for was the disarrangement, and actually it was due to the difficulty to get men on a third shift because of the large absenteeism and labor turnover on the Pacific Coast. That really explains the very sharp shift differential there, sir.

Q. Well now, is that all the explanation you wish to



1222

*Philip Taft—For Defendants—Cross.*

make in respect to that? A. That is all I would say, that this is a special case and it is due to the very difficult labor situation in the Pacific Coast area; and the difficulty in getting people to work on off-shifts.

Q. Now you mentioned a moment ago the possibility of the Pacific Coast shipping or longshoremen working on the Pacific Coast being an example of the payment of more hours pay for less hours work; did you not? A. I do not believe I have that in mind, sir.

1223

The Court: What did you intend to illustrate when you mentioned the Pacific Coast?

The Witness: Well, the question was asked whether there are examples where an overtime rate is set and the people as soon as they are working they will not quit at the end of their straight time but the employer will have to allow them to work two hours. And I recall, which I did not do this morning, that that was the condition on the Pacific Coast. And to me that appears more in the nature of a disguised wage increase.

1224

Q. You were not then referring to the Pacific Coast shipbuilding industry? A. No, no. I thought of the longshoremen.

Q. Do you know of a differential in the Pacific Coast shipbuilding industry? A. I do not have it right here. I may have it in my notes.

Q. Well now will you assume that in the Pacific Coast shipbuilding industry in 1943 there was a 15 per cent differential for work done outside of the normal work days as you have described them and 8 hours of pay for 7 hours of work? A. Yes.

Q. And will you assume that my mathematics is correct, and that that indicates a 31 per cent increase of pay for



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the hours worked outside of the normal hours. What would you call that, overtime or shift differential? A. I think that shifts existed there. It was a shift differential.

Q. I would like to call your attention to the Monthly Labor Review, July, 1943 issue, volume 57, No. 1, pages 142, 143, under the heading "Shipbuilding Industry."

A. Yes, sir.

Q. The top of page 1943 reads as follows, in a short paragraph: "The Pacific Coast agreement establishes a 10 per cent differential and allows 8 hours pay for 7½ hours work for the second shift and establishes 15 per cent differential and 8 hours pay for 7 hours work on the third shift."

1226

A. I would answer this, especially on the second shift, it is not uncustomary where there are rotating shifts to allow, or three shifts let me say, either three shifts or non-rotating or rotating shifts, to allow a half hour for lunch on company time. And that is what is there. That is not unusual on shifts because the men are working at a given time and they are allowed that. That situation, while it is high, while the differential is high, still seems to me to have the character of a shift differential because there are shifts there, and there is a differential between the first and the second, and the second and the third.

1227

Q. You would not say then that in this case you were approaching that mythical point where you could differentiate between shift and overtime? A. No, because there are other reasons to explain it, why it is a shift differential. The labor conditions, the difficulty in getting people on the second and third shifts. And may I say that that is precisely the reason why the shift in the lumber industry was so high, the shift differential.

Q. I would like, before I forget it, and his Honor may or may not have covered it this morning; I hope if it has been covered you won't think I am trying to drive the



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point home, but I want to be sure that the answer is in the record: Do you know of any other industry in which there are three shape-ups or the equivalent of three shape-ups a day? A. I do not, sir.

1229

Q. I would like to refer you again to your testimony of yesterday, Professor, which you have gone over so many times today, just as background for my following questions: I would like to call your attention to Mr. Taylor's question as to the purpose of overtime and your answer, the substance of which was that it is an attempt to impose economic sanctions or an economic penalty upon the employer so as to discourage him from continuing work at either certain periods or after a certain number of hours have been worked. You were then asked what was the history of the development of that concept, and if I am not mistaken all of your answers today have had that concept at the very basis of your reasoning, have they not? A. Yes.

Q. Now, after an objection and the Court's allowance over my objection your answer was as follows:

1230

"Well, the demand for shorter hours by organized labor is one of the first demands that have appeared in our industrial history. Early in the 19th Century, and even at the end of the 18th, when labor first organized, the demand for the reduction of hours made its appearance, and several justifications were developed, and those have been, with changes to suit the different times, have been used throughout our history."

Now, here are the reasons that you gave:

"First it was customary to work very long hours in industry, 12 and 14 hours a day, and we have what



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is called the citizenship argument, the demand that a free citizen must have leisure time so as to be able to exercise his franchise intelligently."

Now, that reason would pertain to hours of work of an individual, would it not? A. I do not precisely get the question, sir.

Q. Well, perhaps I should make it clearer. The reason which you have given would pertain to continuing hours of work of a man who had worked the normal day's work? A. That is right.

1232

Q. The next reason that you gave is: "Then you have the development of the idea that a reduction of hours" will lead to better productivity. That undoubtedly pertained to the individual again, the individual workman, does it not? A. That is right. They will be better workers.

Q. I beg your pardon? A. They will be better workers and more efficient.

Q. The individual who worked shorter hours will work more effectively? A. Yes.

Q. And thus there will be greater productivity, is that right? A. Yes. That was one—

1233

Q. That was what you meant by that reason? A. That was one of the important arguments given for the reduction of hours.

Q. That again pertains to the reduction of hours after regular hours of employment, does it not? A. Oh, no, sir. The regular hours of employment changed and what makes them change is the demands for people for shorter hours. The regular hours of labor are not static; the regular hours of labor were 12 at one time, 14, 10, 9, 8, 40. When you speak of the attempt to reduce the hours beyond the regular hours of labor, I must demur there. It is an attempt to change the regular hours of labor.



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Q. All right. When the hours are 14 and there is pressure to reduce the hours to 12 in terms of this reason which you have given, it is because you want or claim that you will get better productivity if a man working 14 hours is required to work only 12? A. That is so.

Q. The reason therefore pertains to the hours of work of the individual? A. Of course; that is right.

Q. Then you have the development of the idea that a reduction of hours is needed to eliminate or minimize different types of employment? A. Unemployment, sir.

1235

Q. Unemployment. Maybe technological unemployment. A. That is right. It is the work-sharing argument, the work-sharing argument I put it.

Q. That is the same as what you would call the lump of labor? A. Well, I suppose the two things are tied together. People believe that there is a certain amount of work, and therefore you reduce the hours of labor and you pass it around among more people. I do not say that most economists would accept it. But that was the driving force. That is right.

1236

Q. Do you accept that theory? A. No, I do not accept it. But I believe that it has been a very, very important and a very significant reason or driving force behind the shorter hour movement, the consciousness by labor that there is a limited amount of work and that unemployment is ever present. I hope I don't have to give the reasons why I do not accept it, your Honor.

The Court: No.

Q. I would like to ask you one final question, Professor. Mr. Nolan who was a member of the negotiating committee for the Shipping Association testified here (p. 156):

"Q. What is the purpose of overtime in the industry? A. The purpose of overtime"—there was an interruption.



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and then he continued—"well, I would say basically to get the benefit to its membership of increased income when and if they are called upon to work outside of the regular or straight time hours prescribed in the agreement."

Would you agree? A. I would not, sir.

Q. Would you agree that the history of this industry as you have stated it indicates that that is a correct answer to the question? A. No, sir.

Q. You would not? A. I would not. I would disagree.

Mr. Goldwater: That is all.

1238

The Court: Professor Taft, let me ask you this question. You have expressed the view that the overtime involved in the I.L.A. contract is what you call true overtime—

The Witness: Yes, sir.

The Court: And not a shift differential.

Now, supposing we take the I.L.A. agreement and make some revisions in it, revisions in language, taking care, however, to produce the same dollars and cents effect. Then I want to ask you whether, assuming you read an agreement of this type which I am about to formulate, your view would still remain the same.

1239

Suppose an agreement, instead of providing for three shapes a day said there shall be three shifts a day and to provide that the first shift should be in effect from 8 in the morning until 1 at noon, and the second one from 12 noon—isn't it, until 12 to 1?

The Witness: Yes.

The Court: The second shift should be in operation from 1 until 5, and the third shift for whenever the third shape is in effect.



## Colloquy.

Mr. Taylor: When does it end? The third shift begins and ends where?

The Court: When does the third shift begin?

Mr. Taylor: 6:55.

The Court: 6:55, and runs for 8 hours beyond that.

Then suppose it provided that the rate of compensation for shift No. 1 shall be \$1.25 an hour for the first 40 hours and \$1.87½ an hour for all hours in excess of that, that the wages for shift No. 2 shall be \$1.25 an hour for all hours up to 40 and \$1.87½ for all hours in excess of 40 hours, and that the rate of compensation for the third shift shall be \$1.87½ period.

Now, supposing that was the agreement which was presented to you for examination and you were asked to state whether the rate of compensation specified for the third shift constituted a shift differential or whether it constituted compensation for overtime, what would your answer be?

Objection? No. All right.

Mr. Taylor: No, I know the answer. I mean, the answer to the objection.

The Witness: Certainly the distinction between the first and the second shift would be clear. A 25 cent—

The Court: They would be exactly the same. The first and the second shift I provided the same rate of compensation.

The Witness: Oh.

Mr. Taylor: \$1.40 for the second shift.

The Court: Oh, I did not mean to. \$1.25.

Mr. Taylor: I thought you said \$1.40.

The Court: No. \$1.25 for the first and \$1.25 for the second.



The Witness: Certainly.

The Court: The question I want you to fix your mind on is, what would be your opinion in the light of your professional competence as to whether the premium provided for the third shift constituted a wage differential or overtime compensation?

The Witness: It is 50 per cent, isn't it, sir?

The Court: That is right. But the language of the agreement is as I have revised it.

Mr. Taylor: And all the customs in the industry are just the same.

1244

The Court: Everything else exactly the same. The only difference is the language which I have incorporated into this agreement.

Mr. Taylor: Well, of course I do object because I do not see how you could assume that any such agreement would ever come into being, into existence, in an industry, the nature and characteristics of which as you know; it just doesn't fit into anything that is realistic according to the evidence in the case.

The Court: I am not aware that I have changed any working condition or working circumstance: all I have tried to do is to change some language in an instrument.

1245

Mr. Taylor: Yes, but the language in an instrument is never unrelated to the practices in the industry. It always makes sense in one way or another, and the sort of arrangement which you have assumed here, in my opinion, if I may say so, respectfully, could not have been possible when you had the type of situation that we know you had here in this port. It is so completely irrational that you can't draw anything other than irrational speculations on it.



*Colloquy.*

The Court: Do you find anything irrational in my having drafted an instrument for the particular industry that I assume—

The Witness: Being an economist I don't use such strong language, your Honor.

The Court: Oh yes, that and stronger language.

The Witness: No. I never do. I never even speak that way to my students, and I certainly would not to your Honor.

The Court: I am just a free student in your course today.

The Witness: No. I don't find it irrational, but I would simply say certainly it is not irrational, an assumption is not irrational because it is a perfectly reasonable assumption. But I would say it is unreal, it is unreal in relation to the industry.

The Court: When you say unreal you mean that it could not be with those words used in the contract?

The Witness: No, I feel this; here is why I believe it is unreal, because first of all it sets up shifts which in themselves are dependent upon a certain type of regularity, and secondly it sets up a shift differential which normally for the normal operation of an industry, if there are not such factors as difficulties of labor recruitment, would be excessive, it seems to me.

The Court: Assuming nevertheless that this document were drawn by a lawyer who is unfamiliar with the longshore industry and consequently did not use the terminology of the longshore industry—

The Witness: I would have to say, sir, that as you set it up you have set up a shift differential.



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The Court: A shift differential?

The Witness: I think so.

The Court: Very well. We will take a short recess. And I will see counsel in the robing room.

(Short recess.)

DAVID ALOYSIUS MCCABE, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination by Mr. Taylor:

1250

Q. You live in Princeton, New Jersey? A. I do.

Q. You are on the faculty of Princeton University?

A. I am.

Q. Will you please tell the Court about your education and experience bearing on your qualifications as an expert in this case. A. I studied labor relations during my graduate work at Johns Hopkins University, in preparation for the Ph. D. degree. My doctoral dissertation was written on the subject of the standard rate in American trade unions, and that was subsequently published in 1912. I published a book with Professor George E. Barnet of Johns Hopkins University on "Mediation, Investigation and Arbitration in Industrial Disputes", in 1916. That book grew out of some work I did for the United States Commission on industrial relations in 1914 and 1915. I prepared a report on that subject of governmental mediation in labor disputes with Professor Barnet, a report that was submitted to the Commission. I have studied collective bargaining in the flint glass industry in particular many years ago. I made that study, and made a report on collective bargaining in the flint glass industry for the United States Commission on Industrial Relations.

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I also made a report for that Commission on collective bargaining in the general ware division of the pottery industry, and one on collective bargaining in the sanitary ware division of the pottery industry, and I subsequently published a book on national collective bargaining in the pottery industry.

I also published a book, in collaboration with Professor Richard A. Lister on Labor and Social Organization. That was in 1937 or 1938, I forget which. I have written articles on labor relations and the law of labor relations that have appeared in a number of different journals of proceedings.

1253

Now do you wish me to mention those?

Q. No, I think that is enough. You might tell us what your department is, and your subjects, at Princeton University. A. I am one of the professors of economics. I give courses in what are called there labor problems for undergraduates, and courses for graduate students, also in the general field of labor organization and collective bargaining, and also in the field of labor legislation.

1254

Q. How about service on any panels or arbitration committees, or boards? A. I was chairman of the Newark Regional Labor Board under the National Labor Board in the days of the National Recovery Act. I was chairman of that board in 1933 and in 1934. After September of 1934 I was a public member of the Philadelphia Regional Labor Board. I served as an industry committee member of several different industry committees under the Fair Labor Standards Act. I have acted as an arbitrator on nomination of the National War Labor Board. I have also acted as a panel chairman under the Regional, Second Region Board, for New York and New Jersey, of the National War Labor Board. I have acted as an arbitrator on occasions for the New Jersey State Board of Mediation, and I have acted as an



arbitrator in a number of cases at the request of the parties, at their choice.

Q. Professor McCabe, what was meant by the term "overtime" in American industry prior to the Fair Labor Standards Act?

Mr. Goldwater: I object to that as immaterial and irrelevant.

The Court: I will allow it.

A. The term "overtime" was applied to time worked beyond a given number of hours, or outside a specified schedule of hours, including hours on specified days, such as Sundays, in some cases Saturdays, and holidays. The term was also used for the amount that was paid for working those hours designated as overtime.

1256

Q. How long has it been used in that sense? A. The term "overtime"?

Q. Yes. A. The first case that I recall of the use of the term "overtime" in this country was by the iron moulders, in their 1876 convention. They used that term in a resolution of the convention. I think, though I am not sure, that it was used earlier in Great Britain, but I did not find the term in general use in this country in the 1880s. That is, I have gone over reports of that period, and statements in articles of the early 1880s, in which the term "overwork" was still in use, but I find in the reports, for example of the New York Bureau of Statistics of Labor in the late 1880s and early 1890s, I find the term used there rather generally.

1257

Q. What was the purpose of overtime?

Mr. Goldwater: Objected to upon the same grounds.

The Court: I will allow it.



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A. The purpose of the overtime rate was primarily to discourage the working of the overtime hours.

Q. How prevalent has the use of overtime for that purpose been in the country prior to the F. L. S. A.?

Mr. Goldwater: I object on the same grounds.

The Court: Overruled.

Mr. Goldwater: Exception.

1259

A. As I understand the question, it has to do with the degree of prevalence of overtime pay before, let us say, 1938. My impression is that it was confined very largely to organized trades, and the degree of organization of American workers down to, let us say, 1933, was not high, so that over American industry generally the overtime concept, as I have used it here, was not general. My impression is that in unorganized industries it was not the general practice to pay men a much higher rate for so-called overtime hours.

The Court: Any higher rate? You say much higher rate. Was it customary to pay a premium at all?

1260

The Witness: I do not think it was, your Honor.

The Court: All right.

But beginning with the organization— A. In the organized trades, as, for example, in the building trades, in some of the metal trades, in bituminous coal, in the clothing industries, and this is not intended to be an exhaustive statement of the list of organized industries in the United States, the practice of demanding and receiving overtime rates was generally followed; but in 1936 and 1937 there was a very great expansion of union organization, and with it went a very great expansion



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of the practice of paying overtime rates under union contracts.

Q. Without going into too much detail, could you illustrate by some references or examples the attitude of the unions in the use of the overtime mechanism to accomplish the union purpose?

Mr. Goldwater: Objected to as immaterial.

The Court: I will allow it.

A. You wish me to give an example of the use of the overtime rate?

1262

Q. Yes, just to clarify it and show how it was used?

A. For example, in 1890 there was a bricklayers' and masons' agreement here in New York City that stated the regular—I am going by my memory. I can look it up—the regular hours of labor as, let us say from 7 to 12 and 1 to 5, and required that all other hours be paid for at double time. I have here a number of such contracts.

Q. Well now, will you tell us a little bit about the relation between the total weekly hours and an accepted or normal regular working day of so many hours per day in connection with the general labor movement in this country? Is my question clear to you? Evidently it is not.

1263

A. You wish me to talk about the weekly hours or the daily hours, or both?

Q. I assume, Professor, it has been part of the union purpose to reduce the total number of hours which union members work during the week, and what I want you to tell us about is the relation between that group, that objective, and the fixing of a normal and regular working day of so many stated hours in each day. A. The earliest organized movements for reductions in working hours were, as I recall it, stated in terms of the working day. For example, the movement for the ten-hour day among such



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labor organizations as there were in the 1820s and 1830s. The limitation of the working hours to ten a day would be almost automatically the fixing of a weekly limit of 60 hours, because in those days it was not customary to work on Sundays. It seemed to be generally accepted that Sunday was not a working day. Consequently, if you limited the hours of labor to ten a day you would be fixing a 60-hour week. Does that answer your question?

1265

Q. It does in part. I also wanted you to say what there is to be said about the difficulty of policing an agreement to the effect that the parties could not work more than so many hours a week, unless as part of the arrangement the hours to be worked during the day were also fixed, and you might tie that in particularly to an industry like the longshoremen's industry. A. Well, in the case of the 10-hour movement frequently they set what the hours would be, but not always. By that I mean what the starting hour should be and what the quitting hour should be. Then they provided in some cases for the payment of a higher rate for the hours in excess of a particular number or the hours after a particular clock hour.

1266

As early as 1853, I think in Cincinnati, the organized printers established a rate of what they called price and a half for work beyond certain hours. That practice was followed more and more as time went on.

And so far as the longshore industry goes, the first account that I have seen of requiring payment of higher rates after a specified hour in the evening and before a specified hour in the morning was the statement in Barnes' book with respect to the year 1872. I believe that was cited here this morning, because I recall furnishing a copy of the book.

Q. I don't think I have quite gotten across to you yet, Professor McCabe the particular thought I had in mind.



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If a contract merely provided that men should not be worked more than 10 hours in a day, without stating the time during the day when those 10 hours should be put in, but merely imposing a limit of 10 hours at straight time, do you see, wouldn't there be some difficulty, particularly in a casual industry, to see whether or not employers were taking advantage of individual workmen and working them more than the permitted 10 hours, unless it was fixed by the clock that everything between certain hours was straight time and everything outside of those hours was overtime? A. Yes, that has appeared in some industries. If—let me start again, please. If it is to the advantage of the employer to have a variable starting time according to the particular circumstances of that particular day, the men would be exposed to being worked to an unpredictable hour. That is, the quitting time would be variable and unpredictable in advance for the men and their wives unless the quitting time was fixed and some means of enforcement or discouragement provided against running the working day past that particular hour. In other words, under those circumstances, the union would have to aim at controlling not only the number of hours but the clock hours within which that number of hours was to be worked. Have I made that clear?

1268

Q. I think so. Will you tell us whether or not the overtime practice concept has been adopted in legislation in this country prior to the Fair Labor Standards Act? A. Yes.

1269

Q. Will you tell us about that and amplify your answer a little bit, please? A. The first case I recall was the amendment to the old 8-hour law.

**The Court: The Adamson Act?**

**The Witness:** The Adamson Act of 1916 provided that 8 hours should be the standard for work and pay but it did not fix the rate for overtime.



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A. The unions had asked for time and a half and the President, as I recall it, in his suggestions to Congress suggested that the principle of the 8-hour day be recognized by enacting a basic or standard 8-hour day and leaving for later determination, after report by a Commission, the question of whether the overtime rate should be pro rata or more than pro rata.

Does that answer your question, your Honor?

The Court: Yes.

1271

A. (Continuing) Shortly after that, or it might have been about the same time, Congress amended the old 8-hour law to permit the President to declare a state of emergency which would leave the prohibition against the contractors working men more than 8 hours; in other words, the President could proclaim a continuing emergency. And by legislation, as I recall it, it was also stipulated that time and a half should be paid for those overtime hours. There was a piece of legislation having to do with customs inspectors in 1920 in which Congress provided for the payment of overtime to inspectors who worked in overtime hours at the expense of the vessel, as I recall it.

1272

The Court: That is right.

A. (Continuing) The next one of any consequence that comes into my mind is the Walsh-Healy Contract Act of 1936, and that fixed on contracts for Federal supplies I believe over \$10,000 a maximum of 8 hours in one day and 40 hours in one week. But provided that the Secretary of Labor should be authorized to exempt from this provision on condition that time and a half be paid for the overtime, and the Secretary of Labor almost as soon



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as the Act was passed, as I recall it, issued a blanket permission to work overtime under those conditions.

There may be others, but if there are I don't recall. There is state legislation. There is the famous Oregon 10-hour law which used the time and a half overtime provision for an emergency three hours of overtime.

Q. Was there a customary or usual overtime rate? A. Was there a usual overtime rate?

Q. Yes.

Mr. Goldwater: Objected to as immaterial.

The Court: I will allow it.

1274

A. I would say yes. I would say time and a half, although there was before 1938 considerable double time, particularly in the building trades.

Q. Was there any distinction in industry generally between overtime, meaning work in excess of a stated number of hours, and overtime, meaning work outside of an approved or normal work day?

Mr. Goldwater: That is objected to as not being relevant to this industry, and immaterial.

The Court: I will allow it.

1275

A. The term overtime has long been applied in American industry to both types, to work in excess of a specified number and to work outside of stated hours or days.

Q. Are you able to give the Court some idea by referring to particular types of contracts or particular industries as to illustrations of contracts where overtime meant work done outside of the normal and regular work day? A. Why, I have some here.

Q. Are there a substantial number of them? A. Yes. The contract is general in the building trades of stating



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the regular day in terms of clock hours and then adding all other hours are overtime. Sometimes it is stated this way, that time between 4.30 or 5 in the evening and 7.30 or 8 in the morning shall be considered overtime and paid for, and the usual rate in the building trades is double time. Of course, there is the overtime rate in many industries for Saturday as such and for Sunday as such and for specified or named holidays as such. But this practice of stating what you might call overtime rates for night hours, this practice is not confined to the building trades. You find that generally in the building trades, you find it to some extent in the metal trades, that is machinists and boilermakers, blacksmiths, moulders and foundry men, and you find it in scattering other industries. And I wouldn't say that there are many industries in which it is the general practice. But particular contracts can be found in a number of different industries.

Q. What is meant by a shift differential, Professor McCabe? A. A shift differential ordinarily means a differential rate of bonus paid to the workers for working in second or third shifts as distinct from the ordinary regular or daytime shift.

1278

Q. Is there any difference in purpose between the shift differential and overtime? A. Yes.

Q. What is it? A. The purpose of the shift differential as commonly used is permissive; it is permissive and compensatory. Whereas the purpose of the overtime rate is to discourage the working of the overtime hours.

Q. Can you state that there is any general normal relationship between straight time pay during one shift and the amount paid in succeeding shifts; in other words, how big do shift differentials normally run?

Mr. Goldwater: Objected to as immaterial.

The Court: I will allow it.



A. Let me say, sir, that the shift differentials, as I recall it, were not a general practice in American industry before this war or between World War I and this war. I should say that the usual rates on shift differentials were 5 cents an hour or 5 per cent for the second shift and 10 cents an hour or 10 per cent for the third shift. Those were exceeded in particular cases, especially during the war.

Q. How much does the shift differential ordinarily run?

A. Well, a couple of years ago I should say that it was 5 cents or 5 per cent for the—5 cents an hour or 5 per cent added to the hourly rate for the second shift, and let us say 10 cents or 10 per cent for the third shift. Those are the figures that stick in my mind as usual.

1280

Q. Have you ever known a shift differential as high as 50 per cent? A. As high as 50 per cent?

Q. Yes. A. No, sir.

Q. Will you trace for us in general terms, Professor McCabe, the history of overtime rates in the longshore industry? A. I will do that, using the term overtime rate retroactively, if I may, your Honor.

In 1872 in this port the men got a rate of double for the overtime hours. There are reports—I have not been able to verify them fully—there are reports that time and a half was paid in New Orleans as early as 1870. I have seen an overtime rate of 50 per cent, that is time and a half for the Puget Sound area in I think 1886. Does that—

1281

Q. Go ahead. Tell us about the development of the whole industry. A. The overtime rate of double time in New York for the night overtime hours was obtained apparently in—it was obtained in a time of good business, 1872. And after the panic of 1873, or shortly after that panic, the employers refused to pay the double time



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rate for night overtime, and there was a strike on that issue and the men lost.

In 1886 there was a strike in this port that spread from the New Jersey side of the port. The Knights of Labor were involved in that strike. And demanded double time for night overtime in that strike, and they lost the strike.

1283

And from then on the rate for night overtime, from then on, for many years the general practice, so far as I can discover, the general practice was to pay about time and a half for the night work. And to pay—I think double time was generally paid in this port for Sundays and two holidays, Christmas and the Fourth of July; but on the Jersey shore they included Good Friday.

1284

That was the situation when the first agreement was made with the International Longshoremen's Association in this port in 1916, May of 1916 as I recall it. The night overtime hours paid about time and a half and the Sunday and holiday rate was about double time; and although the rates were increased from then on, during World War I and in the active busy shipping years before the United States went into the war, that pattern of time and a half for night overtime and double time for Sunday overtime, that pattern held as I recall it until the National Adjustment Commission, which was appointed during World War I to handle labor disputes and labor matters in the shipping industry, particularly with respect to stevedoring and longshore work; that Commission established a flat rate of time and a half and did away with the double time for Sunday. But it did give the men the 8-hour day and the Saturday half holiday. And after the war, in this port I think that shortly after the war the Saturday half holiday was curtailed, that is, to only four months. Later it was extended to six months, May to October; and about 1926 I think it



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was the men got the Saturday half holiday or the 44-hour week. And that situation held pretty generally in this port down until this war.

On the Gulf where the I. L. A. had the men well organized before the war, that is in the port in which it had the men well organized, they followed pretty much the same pattern; and the National Adjustment Commission gave about the same award except that they did not get as I recall it the Saturday half holiday down there at that time.

Does that answer your question?

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Q. I think so. Do you find generally then, Professor McCabe, in the history of longshoring in New York, since the time when it became truly organized through the I. L. A. about 1915 or so, the same sort of pattern, the same sort of union purpose, the same sort of objectives that you find in organized industry generally throughout the United States? A. Yes.

Q. Have you anything to suggest as to a particular reason why it is important in the longshore industry to have the contract set up on the basis of a regular day of, we will say, 8 to 12 and 1 to 4 rather than on any other basis or arrangement? A. Yes, sir. From the standpoint of the union—

1287

Q. What is it? A. It is to put economic pressure on the employers to channel the work as far as possible into those hours of 8 to 5 and from Monday to Saturday noon; and now I understand, under the award, Friday night.

Q. Do you have sort of a definition of your own for this type of overtime that goes by the clock? Do you call it automatic overtime? A. I have called it automatic overtime and I have since changed it a bit and I am now inclined to call it "as such overtime."

Q. Perhaps we can use that expression for convenience



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from now on. I would like to ask you whether you can suggest any other reasons for the existence of as such overtime in the longshore industry? A. The first reason being that the employers are under particular temptation to vary the starting time and finishing time with the circumstances of the day.

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Q. That is one reason. A. There is another difficulty from a union standpoint in this industry, as I see it, that would make it advisable to fix certain hours as straight time hours and that is that the longshoremen may move, and frequently do move, during the week from one employer to another. Now, if a man has worked we will say 8 hours on this pier and the job is finished and if he goes to work on another pier within an hour or so and works another 4 or 5 hours, frankly it might be difficult to enforce the payment of overtime if your only requirement were that overtime shall be paid to the man for hours in excess of 8 in any one day.

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Now, if you say that the regular work hours are from 8 a.m. to 5 p.m. with an hour out at noon for dinner from Monday to Friday, or as it was in the old agreement for so many years, from Monday to Friday, and from 8 to 12 noon on Saturday, then anybody who is working outside of those hours is automatically working overtime.

Q. And of course it is particularly true in this industry that men do move from pier to pier and from employer to employer? A. Yes. Frankly I do not know how much of that there is percentagewise but it is apparently frequently done. That is, a man's week, a man's week of 44 hours under the 1943-45 agreement; the man's week of 44 hours would not necessarily be worked with the same employer, it might be worked for two or three different employers.



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The Court: Before you had a limitation of so many hours a week the man might conceivably work 70 hours and get only straight time?

The Witness: He might.

The Court: If there were no clock limitation.

The Witness: If there were no clock limitation. I believe that is known in social reform circles with respect to women's hours as swamping.

The Court: Swamping?

The Witness: I think that is the term applied to it, where the term does not fix hours within which the maximum hours must be worked.

1292

Q. Now I suppose you know, as we all do, that here in New York as well as generally throughout the country, we had different conditions in wartime from what we had in peacetime? A. Yes, sir.

Q. Is there anything in those circumstances that would lead you to change your opinion that the overtime under these collective bargaining agreements is true overtime? Is there any difference in thinking or concept of purpose between peace and war? A. Not as a long-run proposition. Certainly the purpose of inhibiting or discouraging work being the specified hours is not retained during war. For example, we had an Executive Order—I do not attempt to remember the numbers of these Executive Orders; we had an Executive Order in February of 1943 to the effect that in war industries unless you were working 48 hours a week you were a slacker. Now, that was a statement that overtime in the Fair Labor Standards Act terms, was to be worked. The Act was passed in peacetime. It was passed, if I may be permitted to say so, in what some people called a recession. Only a few years later, because of a war condition, the President of the United States practically—he urged people to work

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48 hours a week when the professed purpose of the Fair Labor Standards Act was to discourage the employment of people, the same person, more than 40 hours a week. But I would say that when that war condition passes, the primary and permanent purpose of the Fair Labor Standards Act will re-emerge. We went through—I am older than any of you—we went through this in World War I.

Mr. Goldwater: May I challenge that for myself.

1295

The Witness: You challenge that statement?

Mr. Goldwater: Yes.

A. (Continuing) We went through this in World War I. Although the Government so far as possible established the basic 8-hour day the Government, as I recall it, asked its contractors to work people more than 8 hours a day and pay them overtime at time and a half for so doing.

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The Court: Do you recall the campaign on the part of some segments of industry to have the 40-hour law of the Fair Labor Standards Act changed to a 48-hour week?

The Witness: I have noticed such suggestions, sir.

The Court: Do you regard that as well advised?

The Witness: As a peacetime—

The Court: No. During this war.

The Witness: Yes, yes, that suggestion was made. I considered that suggestion myself in 1940. It was proposed that not only should the President suspend the time and a half provision of the Walsh-Healy Act but that Congress should suspend—well, should suspend the coming of age



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of the Fair Labor Standards Act and put it up to 48. I remember writing at the time that the question was not a question of whether time and a half should be paid for overtime but a question of when time and a half should begin. I recall that distinctly, your Honor.

The Court: Very well. Go ahead.

Q. Turning your attention for a moment to the matter of terminology, can you tell us whether or not the word overtime has been used in the stevedoring industry prior to the Fair Labor Standards Act to describe— A. It has.

1298

Q. —the work at night and on Sundays and holidays?

The Court: The answer is yes.

The Witness: Pardon me?

The Court: The answer is yes.

The Witness: The answer is yes. Do you want the instances?

Q. I do. A. I don't want to take up too much time by looking through my notes here; if you will let me trust to my memory for the moment I will go ahead.

The word overtime was not in general use in American industry in the early 1880s. But in the report of the New York State Bureau of Statistics of Labor for 1887 there is an account of the 1886 longshore strike in this port. And in that account the report refers to an offer made by the Old Dominion Line to its men to pay them what it called a day rate of so much, the figures I forget, and for overtime or an overtime rate, and the Board adds in this report, "impliedly night work."

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Now, within the industry itself, the employers I know used the term in 1907; the union, the I. L. A. used the term in some demands it presented to the shipowners.



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stevedores; and in the 1918 demands of the I. L. A. for the North Atlantic ports demands which were passed upon by the National Adjustment Board, the union in those demands called this overtime. It was asking for double time for overtime, and it included nights and Sundays and Saturday afternoons in that category.

1301

Q. In other words, an examination of the collective bargaining agreements will show that in the early days they used the words "night work" or "night time" or "day work" or "day time", and did not use the word "overtime". You yourself have seen these documents?

A. I have.

Q. Written currently, in which what is now called overtime was actually referred to as overtime? A. Yes.

Q. As a matter of course, and common understanding as between the unions and the employers? A. Yes.

Q. What are the documents to which you refer and where did you see them? A. The documents in the industry?

Q. Yes.

1302

The Court: The source from which you derived this information.

A. Well, in 1907 the Shipowners Lines—I have forgotten exactly the terminology—adopted a resolution, and they adopted a memorandum to be released to the press, in which they referred to what was commonly called the night rate as an overtime rate. I think it was something like this: 30 cents day rate, 45 cents night rate; and the next document—

The Court: They called it overtime or night rate?

The Witness: They called it both.



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**Q.** Indiscriminately or synonymously? **A.** My recollection is that they used both terms, but I know they used the term "overtime".

**Mr. Goldwater:** May I ask at this point if the witness has the document, or a copy of it, in court?

**The Witness:** I saw that document in the office of the New York Shipping Association, and I took some notes from it. I do not know whether I have them here or not, but I think the document could be produced.

**Mr. Goldwater:** Perhaps your notes will do, Professor. I might ask you to refer to those later.

1304

**The Witness:** Yes. The next document from the industry to which I have referred was something in the nature of a circular which was sent to the employers by the New York District Council, I think it was called, of the I. L. A. This circular embodied what are often called, your Honor, in union circles, demands. They are requests, or possibly hopes, but they are usually called demands. These demands used the term "overtime" for the rate asked for the night hours.

The next document to which I referred is in the New York Public Library. It is a typewritten or mimeographed document, I have forgotten which, a copy of hearings that were held here by the National Adjustment Commission in 1918, and it appears in those hearings that the longshoremen in the I. L. A. made demands for the various North Atlantic ports. Although I understand that the I. L. A. did not represent Philadelphia, it made demands for Portland, Maine, Boston, New York, Baltimore and the Hampton Roads ports. These were uniform demands, and these uniform demands are referred to in the—in fact, are included in the

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record of those hearings; and in those uniform demands we have the term "overtime," applied to the rate demanded for the night hours and Saturday afternoon and Sunday. There is a copy of that document in the New York Public Library. That was the only place where I could get hold of it.

Then if you want me to go on—

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Q. No, I guess that is probably enough. That is more than enough. Professor McCabe, have you made a study of the legislative history of the Fair Labor Standards Act? A. I have.

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Q. Is there any specific discussion in the legislative history of what Congress intended by the words "regular work" in Section 7? A. I have gone over the legislative history, and I have gone through the reports of the Senate and House Committees and the Congressional Record. I do not recall any discussion of that term "regular". "His regular hourly wage" was used I believe in the original bills. As I recall it, the House bill and the Senate bill were identical, with one or two minor exceptions that had to do with foreign trade or imports or exports. My recollection is the expression was "his regular pay of wages." The reports and the discussions were rather casual about it, as I recall it. Sometimes a report would say "his regular rate of pay". There were several reports. You will recall, your Honor, that the bill had a long legislative history.

The Court: Starting with Senator Black's 30-hour bill.

The Witness: In this connection I recall that in the Special Session of December, 1937, an amendment was proposed in the House and adopted by Representative Bullwinkle. He proposed that the



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time and a half rate be applied also to what he called the graveyard shift, and he said his purpose was to eliminate it. One of the Representatives, Representative Ramspeck as I recall it, referred to this as an overtime rate of \$1.50. The question was what was it to be time and a half off? The House Committee had proposed earlier, although this was never debated, that the graveyard shift be penalized by a rate of one and a half times the minimum rate specified in this bill, whereas Representative Bulwinkle's amendment was to the effect that it should be one and a half times the rate otherwise payable; and there was some discussion of that, because none of the members of Congress apparently still thought that that meant the minimum wage fixed in the bill; and it was pointed out very clearly in the case of highly skilled workers such as in the textile mills up in Connecticut, the ordinary or regular rate, that is the rate otherwise payable, would be considerably above the minimum rate to be specified in the bill.

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Now that is about the only discussion in that connection that I recall. I do recall that the so-called American Federation of Labor bill, which was proposed and defeated in the Special Session, merely specified that 40 hours shall be the limit, not to be exceeded except in an emergency, and then only on payment of time and a half. It did not say time and a half of what. Now that is the regular AFL practice, time and a half.

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I hope I have not gone into this too far.

Q. Professor McCabe, are there any facts or circumstances to which you might direct the Court's attention, which indicate, or tend to indicate, that Congress intended to exclude overtime from regular pay? A. Yes, I think so.



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Q. What are they? A. In the first place—

The Court: You are now using the word "overtime" meaning night work?

Mr. Taylor: Yes, sir.

Mr. Goldwater: I object to it as immaterial and irrelevant, and not competent for this witness to testify.

1313

The Court: I do not think he is testifying. I think he is arguing, and on the basis of the discussion I had with counsel in chambers I will allow it, by appointing him counsel pro hac vice, or quasi-counsel. This is strictly not testimony. He is calling the Court's attention to certain material in the Congressional Record, to which I would have access whether or not he testified to it or counsel called attention to it in a brief. So it might be helpful; so go right ahead.

The Witness: I am not sure of the position, your Honor. Am I asked whether Congress intended to exclude overtime, or am I asked whether Congress intended to exclude overtime in the sense of time outside regular hours?

1314

The Court: That is what he should have asked you.

Mr. Taylor: Yes.

The Court: The latter question.

The Witness: I have no basis for answering that question.

Mr. Goldwater: I object to your Honor's construction of the question.

Mr. Taylor: I nodded my head.

Mr. Goldwater: I did not see him, and I do not think the stenographer could. I am sorry.



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**The Witness:** The only basis that I would have on that, that is, whether Congress intended to preclude overtime in the sense of overtime, in the sense of hours outside of a regular schedule?

**Q. Yes. A.** The only basis I would have for arriving at any judgment on that is in connection with this Bullwinkle amendment again. I recall no suggestion or intimation ther that when the House adopted this amendment it intended that if people who were employed in the graveyard shift should be employed for more than 40 hours in one week they should be paid for the hours above 40 time and a half on time and a half.

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**The Court:** You don't know?

**The Witness:** I don't know. I saw no reference to it.

**Q. Have you any opinion as to whether overtime under the collective bargaining agreement with which we are concerned in this case is overtime in the industrial sense in which it is generally used in this country? A.** My opinion is that it is—

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**Mr. Goldwater:** I would object.

**The Court:** I will allow it. The question has been answered several times by other witnesses. Go ahead.

**Mr. Goldwater:** I have already objected.

**The Court:** And I have always overruled the objections.

**The Witness:** My opinion, your Honor, still is it is overtime in the same sense.

**Q. What are your reasons for saying that?**



1318

*Colloquy.*

The Court: All his previous testimony constitutes the reason for that decision.

Mr. Taylor: Well, all right.

The Witness: The purpose of it, and it is in conformity with a rather wide practice in other industries.

Mr. Taylor: Your witness.

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Mr. Goldwater: I think, in view of the fact that the testimony here is largely cumulative and repetitions of the testimony given by the witness Taft, that no purpose can be served by taking hours of covering the same ground again.

The Court: There would not be any purpose. There is no law that makes cross-examination compulsory.

Mr. Goldwater: And I will say to Professor McCabe I am also indebted to him for information, and I have no cross-examination.

The Court: You are excused, sir.

(Witness excused.)

1320

(Short recess.)

Mr. Taylor: If your Honor pleases, before calling my next witness, Mr. Liddy, a Deputy Collector of Customs, here in court, I would like to call your Honor's attention to certain statutes with which you may or may not be familiar, which I think you should have in mind in order to fully appreciate the quality and effect of the testimony.

The Act of February 13, 1911, as amended by the Act of February 7, 1920, which you will find in



its amended form in United States Code, Section 267; provides in part as follows. This is Section 5:

"The Secretary of the Treasury shall fix a reasonable rate of extra compensation for overtime services of inspectors, storekeepers, weighers, and other customs officers and employees who may be required to remain on duty between the hours of five o'clock postmeridian and eight o'clock antemeridian, or on Sundays or holidays, to perform services in connection with the lading or unloading of cargo".

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Then omitting a portion, it continues:

"such rates to be fixed on the basis of one-half day's additional pay for each two hours or fraction thereof of at least one hour that the overtime extends beyond five o'clock postmeridian (but not to exceed two and one-half days' pay for the full period from five o'clock postmeridian to eight o'clock antemeridian), and two additional days' pay for Sunday or holiday duty. The said extra compensation shall be paid by the master, owner, agent, or consignee of such vessel or other conveyance whenever such special license or permit for immediate lading or unloading or for lading or unloading at night or on Sundays or holidays shall be granted to the collector of customs, who shall pay the same to the several customs officers and employees entitled thereto according to the rates fixed therefor by the Secretary of the Treasury: Provided, That such extra compensation shall be paid if such officers or employees have been ordered to report for duty and have so reported, whether the actual lading, unloading, receiving, delivery or examination takes

1323



*Colloquy.*

place or not. Customs officers acting as boarding officers and any customs officer who may be designated for that purpose by the collector of customs are hereby authorized to administer the oath or affirmation herein provided for, and such boarding officers shall be allowed extra compensation for services in boarding vessels at night or on Sundays or holidays at the rates prescribed by the Secretary of the Treasury as herein provided, the said extra compensation to be paid by the master, owner, agent, or consignee of such vessel; Provided, further, That in those ports where customary working hours are other than those hereinabove mentioned, the Collector of Customs is vested with authority to regulate the hours of customs employees so as to agree with prevailing working hours in said ports, but nothing contained in this proviso shall be construed in any manner to affect or alter the length of a working day for customs employees or the overtime pay herein fixed."

I would like to call your Honor's attention also to Sections 401, 450 and 451 of the Tariff Act of 1930, which you will find in the Code, Title 19, Sections 1401, 1450 and 1451. Omitting certain portions, I call your Honor's attention to the fact that in one of these sections which is involved with the definitions, the following is the definition of "day":

"Day.—The word 'day' means the time from eight o'clock antemeridian to five o'clock postmeridian."

Section 450 says:

"Unlading on Sundays, holidays or at night.

"No merchandise, baggage, or passengers arriving in the United States from any foreign port or



place, and no bonded merchandise or baggage being transported from one port to another, shall be unladen from the carrying vessel or vehicle on Sunday, a holiday, or at night, except under special license granted by the collector under such regulations as the Secretary of the Treasury may prescribe."

Section 451, which follows, relates to what is called "Extra Compensation", and contains this sentence:

"Upon a request made by the owner, master, or person in charge of a vessel or vehicle, or by or on behalf of the common carrier or by or on behalf of the owner or consignee of any merchandise or baggage, for overtime services of customs officers or employees at night or on a Sunday or holiday, the collector shall assign sufficient customs officers or employees if available to perform any such services which may lawfully be performed by them during regular hours of business, but only if the person requesting such services; and the said section 451 is further amended by adding at the end thereof the following: 'Nothing in this section shall be construed to impair the existing authority of the Treasury Department to assign customs officers or employees to regular tours of duty at nights or on Sundays or holidays when such assignments are in the public interest.'"

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Then you may also wish to look at the Customs regulations of 1937, Article 1242, relating to extra compensation for overtime services. Section 1462 (d) says that the act of February 7th, 1920, the one I first called your attention to, also provides "that in those ports where customary working



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hours are other than those above mentioned, the collector of customs is vested with authority to regulate the hours of customs employees so as to agree with prevailing working hours in said port".

FRANK J. LIDDY, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

1331

Direct Examination by Mr. Taylor:

Q. Where do you live, Mr. Liddy? A. 7006 Colonial Road, Brooklyn, New York.

Q. You are Deputy Collector of Customs of the port of New York? A. I am administrative assistant to the Collector of the port of New York.

Q. How long have you been connected with the Customs service, Mr. Liddy? A. Since July 1, 1904.

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Q. And what have been your duties and experience during that period? A. Well, for a period of five years I served as a clerk within the building, which would bring me up to about 1909. Thereafter I served for a period of 25 years as an inspector of Customs daily on the waterfront, on steamship piers, concerning myself entirely with supervisory operations over the lading and unlading of vessels in so far as Customs operations were concerned.

For two years thereafter I served as a staff officer, which necessitated my going down the bay on the Revenue cutter and boarding vessels at Quarantine, and performing certain preliminary Customs operations with the view of expediting Customs matters after we arrived at the pier. And thereafter I would work on different piers for hours, until such time as my requirements were completed.

For a period of two years thereafter I served as Deputy



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Surveyor of Customs, in charge of all the steamship piers in District 5, North River, which, geographically speaking, extended from 42nd Street to Poughkeepsie. That would necessitate my daily proceeding to every pier in that district, investigating the conduct of the business that was performed by our Customs people, looking into the requirements of the steamship companies in connection therewith.

For a year and a half thereafter I served as Deputy Collector in charge of the international participation at the New York World's Fair.

1334

Thereafter I was appointed Administrative Assistant to the Collector of Customs on August 1, 1940, which position I now hold. I am allegedly the trouble shooter of the department; wherever anything goes wrong, either inside or outside the building, it becomes my duty to inaugurate investigations and effect such remedies as I am able to do.

Q. I wish you would tell us a little bit about the relation between the unloading of vessels, that is the actual handling of the cargo, and getting it out of the ship and on the pier, and the protection of the revenues; that is, what the inspectors do and whether they do it when the stuff comes out of the ship or when it goes off the pier; what the relation is between the Customs service and the unloading of vessels?

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Mr. Goldwater: I object to that, your Honor. I think this would be very informative and instructive, but I cannot see the relevance or materiality to the issue that is being tried here.

The Court: Will you justify the question, Mr. Taylor?

Mr. Taylor: Yes. The witness will testify that the normal and usual working day in the port of



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New York is 8 to 5, and that if anyone wants to bring a vessel at any time other than that he has to get a special license and get an inspector up there and pay him the overtime rates.

And the question occurred to me, as one that might occur to the Court, as to whether it would be possible for the ship to be worked at night in the absence of the inspector, and that is all I am trying to get at.

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The Court: All right. I will let him develop it briefly.

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A. Well, two inspectors are assigned to supervise the operations of very vessel upon arrival, and it is the inspector's duty to see that that cargo at the time of its discharge is placed upon a pier within certain confines, and in a certain manner, such that all Customs formalities may be expeditiously thereafter effected. In a word, it must be placed in a weighable condition, it must be placed in a gaugable condition, it must be placed in a measurable condition, it must be placed so that it may subsequently be expeditiously delivered. That necessitates the inspector's performing certain physical operations. He should be out on the pier a good deal, he should be up on the vessel; he will want to know what cargo is coming out of which hatch; he will want to be sure that it is not being removed from the proper confines of that pier; he is interested somewhat in the movement of the steamship personnel, of the longshore personnel, of everybody that has any business around that pier having to do with the removal of that cargo, if he is properly alert and discharging his duties properly.

Q. I think you have answered it very well, Mr. Liddy; but the precise point I am trying to get at is whether or not the operation of unloading a vessel coming from



a foreign port with dutiable cargo on her can go on in the absence of a Customs inspector? A. It may not properly go on, it may not legally go on, it may not go on without the parties in interest first having made an application to the inspector to perform certain physical activities after the conclusion of the normal working day. In a word, a vessel may come up to any port within the port of New York between the hours of 8 a. m. and 5 p. m., and after the captain has proceeded to the Custom House and made proper entry, or prior thereto if his broker has secured what is known as a preliminary entry, the vessel may practically automatically go to work so far as the Customs are concerned on that particular pier, because we have men stationed on all piers, and we have facilities to cover their operations. In a word, the business setup is such that we can't be obstructive, and we must be ready and waiting and permit them to start to work providing they come to their regular piers.

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The Court: If no inspector is on the pier can the unloading of a vessel take place?

The Witness: Lawfully a vessel may not discharge except under the supervision of a Customs officer. That is, providing she is in the foreign trade.

1341

The Court: In the foreign trade?

The Witness: That is correct.

Q. Now then, Mr. Liddy, you are familiar with the 1911 statute and the 1920 amendment, are you not? A. Well, I am familiar with its effect upon Customs personnel, yes, and its application.

Q. Is it true that in this port if a ship wants to come in and discharge after 5 o'clock at night, or Sundays or



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holidays, they have to apply for and get a special permit?  
A. That is correct.

Q. What are the customary working hours in the port of New York for loading and unloading of cargo coming from abroad? A. 8 a. m. to 5 p. m.

Q. How long has that been so? A. Since 1911.

1843

Q. Now are there any places— A. I would like to qualify that now, before we get any further. When I started as an inspector in 1909 the hours were from 7 a. m. to 6 p. m., and shortly thereafter, to the best of my knowledge and belief in or about 1911 they were changed from 8 a. m. to 5 p. m. In 1909 they were definitely from 7 to 6.

Q. Now it is stated in one part of the statute that in ports where customary working hours are other than 8 to 5 the Collector of Customs is vested with authority to regulate the hours of Customs employees so as to agree with the prevailing working hours in the ports. Will you tell us whether or not the Collector of Customs of the port of New York has exercised that power with respect to any port of entry within the port of Greater New York, that is, within his jurisdiction?

1844

Mr. Goldwater: That is objected to as immaterial and irrelevant, your Honor. It has no bearing on the issues that are before you.

The Court: I will allow it.

Do you understand that the question is limited to ports within the port of New York?

The Witness: That is right.

The Court: There is more than one.

The Witness: That is District 10. We have the port of New York and three sub-ports, Albany, Perth Amboy and Newark. The hours in each and all instances are from 8 a. m. to 5 p. m.



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Q. How about LaGuardia Air Field? A. In LaGuardia in view of the fact that—

The Court: Do longshoremen work at LaGuardia air field?

The Witness: They have labor. I wouldn't say longshoremen. They have labor.

The Court: Are any of them within this type of case that we are dealing with?

Mr. Taylor: No. The point I want to make, sir, is that at LaGuardia Air Field, which is within the jurisdiction of the Collector, who has authority to vary the working day when in fact the customary hours are different, he has at LaGuardia Air Field set up three shifts of eight hours each because there is a 24 hour normal day there.

1346

The Court: All right.

Mr. Taylor: But he nevertheless retains the 8 to 5 along the waterfront.

The Court: I will allow him to answer.

Mr. Goldwater: If that is the purpose of the question I object on the ground that they pertain to the shifts of government employees under a statute which has no application to the case at bar.

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The Court: Very well. I will allow it.

In LaGuardia Field you have what?

The Witness: We have what is known as three platoons, three shifts of inspectors. One group starts at 8 a. m. in the morning and works until 5, taking an hour out for lunch from 12 to 1. We have a second group, who come to work at 4 and who work until midnight. We have a third group who come to work at midnight and work until 8 a. m. the following morning.



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The Court: Do they get the extra compensation that the statute contemplates, those that work on the second and third platoons?

The Witness: No, there is no extra compensation in connection with their activity except under a recent statute there is a 10 per cent differential.

The Court: That is not the statute to which we have been referring.

1849

Q. They do not get any overtime under the 1911 or 1920 statute? A. Absolutely; there is no application of that in this situation at all, your Honor.

Q. On the waterfront, that is in connection with the services of inspectors in the loading and unloading of vessels, what is the practice where an inspector who has not been employed during a particular day between 8 in the morning and 5 in the afternoon, for example where it is his day off and he is assigned to go on duty on the waterfront at or after 5 p. m.; does he or does he not receive the overtime under the 1911 statute?

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Mr. Goldwater: Objected to on the same grounds, that it pertains to a Federal employee whose compensation is governed by a different statute.

The Court: Objection sustained. If you want to put the answer on the record you may, under 43(c).

Mr. Taylor: The answer would be that that man—

The Court: Let him tell us.

Q. What is the answer? A. He would be paid overtime under those conditions.

Q. The overtime which is paid by the Collector whenever it has been earned under the 1911-1920 statute, is billed by the Collector to whom? A. To the party in



*Frank J. Liddy—For Defendants—Cross.*

1351

interest. The steamship company for whom the inspector would have rendered service would have to pay the charge. The individual naturally may handle no money and the transaction is handled by the Collector.

Mr. Taylor: Your witness.

The Court: Are you going to examine this witness at all?

Mr. Goldwater: Yes, I have a few questions.

The Court: I was just thinking that this might be as good a time as any—

Mr. Goldwater: I can finish with him before 6 o'clock, I am sure. I have only a few questions.

1352

The Court: Go right ahead.

Cross Examination by Mr. Goldwater:

Q. I would like to ask you first whether a Customs inspector whom you have described shapes up at particular hours of the day and, if so, how many times in the day?  
A. He reports to a station, whatever it may be, at 8 o'clock in the morning.

The Court: Every morning?

1353

The Witness: Every morning.

The Court: He is on regular work?

The Witness: Correct, your Honor.

Q. And he works regularly every day for a compensation paid by the year? A. Correct.

Q. In other words, he has an assured annual compensation? A. Definitely.

Q. Whether a ship is in port or not? A. That is correct.



*Colloquy.*

1354

Mr. Goldwater: I think that is all I have to ask him, your Honor.

The Court: You are excused.

(Witness excused.)

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The Court: We will adjourn now until—7:15! 7:30! Which do you prefer?

1355

Mr. Goldwater: I think 7:30.

(Recess to 7:30 p. m.)

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*NIGHT SESSION.*

1356

Mr. Taylor: I have here, your Honor, a chart which was marked Defendants' Exhibit K for identification and also a statement which has been prepared and apparently is signed by Caleb Smith, entitled "The ability of stevedoring corporations to meet a judgment under the Fair Labor Standards Act." I have not read it, but Mrs. Schleifer has been over it, and if she passes it I am sure it is O.K.

The Court: I am glad that he so entitled it.

Mr. Taylor: And, as I understand your Honor's suggestion, that may be marked also for identification?

The Court: Yes. My suggestion is that you have it marked for identification. And this is going to be tied up to your offer of proof?

Mr. Taylor: Yes.



*Mary L. Schleifer—For Defendants—Direct.*

1357

The Court: This constitutes in effect what your witness would testify to had I permitted the examination?

Mr. Taylor: Yes, your Honor.

The Court: So that a reviewing court can see not only whether the question was good or bad but whether the exclusion was prejudicial.

Mr. Taylor: Precisely.

(Marked Defendants' Exhibit L for identification.)

1358

The Court: What about this chart? Are you offering that? You mentioned a chart.

Mr. Taylor: Yes. That is Defendants' Exhibit K for identification. I offer that in the same way, along with—

The Court: Oh, that has already been marked for identification.

Mr. Taylor: That is right. The two together constitute the offer of proof.

The Court: I see.

All right, call your witness.

Mr. Taylor: Mrs. Schleifer.

1359

MARY L. SCHLEIFER, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination by Mr. Taylor:

Q. Where do you live? A. Washington, District of Columbia.

Q. What do you do? A. I am labor law counsel for the War Shipping Administration.

Q. How long have you been connected with the War



1360

*Mary L. Schleifer—For Defendants—Direct.*

Shipping Administration? A. Since 1942, the early part of 1942; February and March.

Q. In what capacity? A. As an attorney.

Q. Covering what sort of activities and operations? A. Primarily the field of labor law, but of course it extends into all legal activities of the War Shipping Administration.

1361

Q. Are you in position to tell us from your official knowledge in your work with the War Shipping Administration the extent to which the War Shipping Administration took over the steamship companies during the war?

Mr. Goldwater: Objected to as immaterial.

The Court: I will allow it.

A. The War Shipping Administration requisitioned all the offshore fleet early in the war. The requisition was in part on a time charge basis and in part on a bare boat charter basis, but in those two types we took over control of all the offshore shipping fleet.

1362

Q. What is the Warshipsteve contract? A. A Warshipsteve contract is a contract between the War Shipping Administration and an independent stevedore to perform stevedoring operations on vessels which we controlled or operated.

Q. Is it true, as stated by some of the other witnesses here, that where a stevedore who is a contracting party to the Warshipsteve contract wanted to work overtime, he had to get permission? A. The contract so provides.

Q. What are the provisions of Warshipsteve contracts with respect to liability of the War Shipping Administration for the expenses of stevedoring operations, including particularly the amounts paid for wages?

Mr. Goldwater: Objected to as immaterial.



*Mary L. Schleifer—For Defendants—Direct.*

1863

The Court: Overruled.

A. The Warshipsteve contract is a cost-plus contract, and includes reimbursement for all contract labor costs. Perhaps I should qualify that. It is not entirely cost-plus. I believe there is a flat rate in addition to which labor costs are reimbursed, the flat rate presumably taking care of overhead and items other than the labor costs.

Q. Under the provisions of the Warshipsteve contract the amounts paid out by stevedores for longshore wages are something for which they bill the War Shipping Administration and ask for reimbursement under the terms of the contract? A. That is correct.

1864

Mr. Tayler: Your witness.

Mr. Goldwater: No questions.

By the Court:

Q. On the record would you define the offshore fleet, as distinguished from, I presume, the inshore fleet or the onshore fleet? A. I am not sure, your Honor, that I can do that. It is an expression that we use a great deal of the time in War Shipping Administration.

1865

Q. What does it exclude? A. Well, it excludes the small harbor craft, such as barges, although we did have some barges under general agency agreement, and tugs under general agency agreement, but it excludes those that are locally in operation as contrasted with those which go out, perhaps beyond the three-mile limit, or something of that sort.

The Court: Very well.

(Witness excused.)



1366

*Nathaniel Dixon—For Plaintiffs—Rebuttal—Direct.*

Mr. Taylor: The defendants rest.

Mr. Goldwater: Is it proper to move for judgment for the plaintiffs at this stage?

The Court: It is proper.

#### REBUTTAL PROOFS

NATHANIEL DIXON, called as a witness on behalf of the plaintiffs, in rebuttal, being duly sworn, testified as follows:

1367

Direct Examination by Mr. Goldwater:

Q. Mr. Dixon, do you work for the Huron Stevedoring Company? A. Yes.

Q. Can you tell me when you first went to work—

The Court: Is he one of the plaintiffs?

Mr. Goldwater: Yes, sir.

Q. When did you first go to work for Huron? A. April 23, 1944.

1368

Q. How do you fix that date? A. On my identification card, sir, the date when I started.

Q. Is that a card that was issued to you by the Huron Stevedoring Corporation? A. Yes.

Q. Do you know what day of the week that was? A. Yes, on a Sunday.

Q. Did you go to work on April 23, 1944, on Sunday, during the daytime or at night? A. Night shift, sir.

Mr. Taylor: I think the answer is irresponsive. The question is whether he went to work in the daytime or the night time, is it not, sir?



The Court: Yes, but I have heard no objection from the questioner.

Mr. Taylor: The question is all right. The answer I object to.

The Court: You can object to it on the ground that it is immaterial, irrelevant and incompetent. You cannot object to it on the ground that it is not responsive to the question, if the questioner is content. Let me explain it again, because we have that proposition come up in two trials out of three. A question is put which is proper in form, or at least is not objected to. An answer is given which includes more than is called for by the question. That answer might be bad in the sense that if a question were put to which it were responsive the question would be properly objected to. If such is the fact, then a motion to strike is in order by the adversary.—Of course, clearly you cannot sneak testimony into the record that way, but if the answer is responsive to a question which, if put, would survive the objection, then a motion to strike because it is not responsive is meaningless, because if the questioner is content with it all he would have to do is re-put the question to which the answer is not responsive and we would only be wasting time. 1370

Mr. Taylor: I understand that, and I think the question "Did you work on the night shift" would be inadmissible and I move to strike out the answer. 1371

The Court: I will allow the answer to stand.

Q. Whom did you see, Mr. Dixon, when you went to work at Huron that night? A. You mean how did I know about the job?



1372 *Nathaniel Dixon—For Plaintiffs—Rebuttal—Direct.*

Q. Yes. A. The fellow that carries my gang now, the fellow what we call the hatch boss. The fellow that is carrying my gang now, I saw him, I saw him on the street. I used to work with him before I went to the Grace Line. And he told me that he was taking a gang, that he was going to get it together, to the Grace Line, to work, and being that he knew me before, he asked me would I come along. I did so.

Q. Who was this man? A. A fellow by the name of Horace Leighthorne.

1373 Q. Are you familiar with the word shape-up in the stevedoring business? A. I believe so.

Q. Do you know what shape-up means? A. Yes, sir.

Q. Did you shape up at other piers besides the Huron piers? A. Previous to then, before then?

Q. Yes. A. Yes, sir.

Q. What piers did you go to and who were the stevedoring companies who operated there? A. Well, one pier was Pier 32, which is Moore-McCormick; Pier 34, Jarka; Pier 95, 96 and 97, which is Bay Ridge.

1374 The Court: After April 23rd did you also work for these other piers?

The Witness: Well, after April 23rd I worked for Bay Ridge, yes, during the slow season.

The Court: You worked for Huron and Bay Ridge?

The Witness: Yes. When we wasn't working for—

Q. Well, after April 23rd did you go for work, shape up at any of these other piers besides Bay Ridge? A. Yes, sir, whenever there wasn't any work at Huron. For instance, we worked two nights. There wasn't any



*Nathaniel Dixon—For Plaintiffs—Rebuttal—Direct.*

1375

work, naturally, I have a family, so I go to look elsewhere. I went to make a shape.

Q. You went to make a shape at Moore-McCormick and at Jarka at different times? A. I haven't worked at Jarka since I started on April 23rd at Huron, but I have worked at Moore-McCormick, at Bay Ridge.

Q. Did you go to the pier where Jarka operated, to shape up, since April 23rd? A. Yes, I have been there. I went there in the daytime, but it is very hard to get work in the daytime.

Q. You went to shape up at the Jarka place; you were there in the daytime? A. Yes, sir.

1376

Q. And didn't find any work? A. No, sir.

Q. On one occasion or more than one occasion? A. Not at the Jarka; I haven't been there but once since I started with Huron. I had been to Moore-McCormick quite a few times, mostly at night, for the simple reason that it is harder to get work in the daytime than it is at night for us.

Q. Did you go to Moore-McCormick in the daytime also? A. Yes, I have been there in the daytime.

Q. Were you able to get work there in the daytime? A. I have only once since then.

1377

Q. When you did get work that once, was it day work or night work? A. It was day work, sir.

Q. And how many days did you work at the Moore-McCormick Line? A. Three or four days, I don't exactly remember; it wasn't a full week. Three or four days. I have worked there on the night shift at Moore-McCormick since.

Q. You have? A. Yes.

Q. How many times have you worked there at night? A. I have worked a half a dozen different times, not straight; but whenever my pier wasn't working, Huron



1378

*Nathaniel Dixon—For Plaintiffs—Rebuttal—Direct.*

wasn't working. I worked there a half a dozen different nights; not in the same week, in a period of time.

Q. Now you say you are now working at Huron?

A. Yes.

Q. And are you working with a gang there? A. Yes, sir. Gang 24: Gang 24, the gang we started with.

Q. Do you know how many gangs are working at the Huron pier now, approximately? A. Night or day, sir? Night gangs?

1379

Q. Yes, sir. A. Well, they carry about five gangs at night now, sometimes when they are busy seven.

Q. Do you know from your working at that pier how many gangs approximately are carried in the daytime?

A. Anywhere from 18 to 26.

Q. Now is this gang 24, if that is the number you gave me, that you work with, employed regularly, continuously?

A. I can't say that, sir. I can't say any gang is employed regularly. Only when there is work.

Q. Well, for example, when did you last work with gang 24 on the Huron pier? A. The last night?

Q. When did you last work? A. The last night, sir? Sunday night. The last night that I worked is Sunday night.

1380

Q. Last Sunday night? A. This past Sunday.

Q. How many nights previous to that had you worked with that gang at that pier? A. Two nights. Sunday night was our third night of the week ending Sunday night.

Q. You worked Friday night, Saturday night? A. No, sir. We worked Tuesday night, Friday night and Sunday night.

By the Court:

Q. Did you shape up Wednesday night? A. No, sir.



*Nathaniel Dixon—For Plaintiffs—Rebuttal—Direct.*

1381

Q. You didn't shape up? Why? A. Because we had orders to watch the board. They put the orders on the board on the outside.

Q. So you knew there would be no work? A. Not when we left there Wednesday morning. We know that Wednesday at one o'clock, we know that gang wouldn't be ordered out.

Q. Thursday you didn't shape up either? A. No, sir. The orders was to watch the board Friday.

Q. Did you shape at any other pier other than this pier? A. I didn't go out myself, I didn't go out at all.

1382

Q. You just stayed idle? A. Yes, sir.

Q. Since then what have you done? A. I haven't done anything. We had orders to watch the board yesterday. We didn't work last night.

Q. Did you shape at any other pier but Huron yesterday? A. No, sir.

Q. Why? A. I just didn't go out.

Mr. Taylor: I didn't hear your answer.

The Witness: I just didn't go downtown; I didn't go out.

By Mr. Goldwater:

1383

Q. Have you tried in the past shaping up in the daytime for day work? A. I have, sir.

Q. What has been your experience? A. Very tough luck, sir, in the daytime. It is very hard for us to get work in the daytime.

The Court: When you say "for us," what do you mean?

The Witness: I mean longshoremen. It is hard for the average longshoreman to get work in the daytime. I don't want to bring the subject of race



1384

*Nathaniel Dixon—For Plaintiffs—Rebuttal—Direct.*

in it or not, but what I mean by "us," when I say "us," the longshoremen, the colored longshoremen has a very tough time in getting on in the days. That is what I mean.

The Court: That is what I thought you meant. I wanted you to say it.

Q. Since you have been engaged with gang 24 did that gang ever work daytime? A. No, sir.

Q. And it went to work only at the 7 p. m. shape-up at night? A. Yes, sir.

1385

By the Court:

Q. Is your entire gang composed of colored boys? A. Yes, sir. Up until about three months ago. We had one white fellow in the gang. We started off four colored men.

By Mr. Goldwater:

Q. For the last three months there has been one white fellow in the gang? A. Yes, sir.

1386

Q. When you say that you were told to watch the board, how do you get that instruction to watch the board? From whom? A. The stevedore of the pier tells our hatch boss, "Tell the gang to watch the board for orders tomorrow." Always the next day at one o'clock the orders are up.

Q. Is that the regular time to look for the orders to find out whether you are to go to work that night? A. Yes, sir.

Q. At one o'clock in the afternoon?

The Court: So you go down to the pier at one in the afternoon to see whether you are to report for work that night at 7 o'clock?



*Nathaniel Dixon—For Plaintiffs—Rebuttal—Direct.*

1387

The Witness: Yes, sir.

Q. Now, that is the pier where the ships of the Grace Line are loaded, is that so? A. Yes, sir.

Q. Will you give us the pier number? A. Pier 57 and 58, North River.

Q. Do I understand that you have been working now with this gang on and off, as you have described it, but more with this gang than any other work, since Sunday, April 23, 1944? A. That is correct, sir.

Q. Were you at one time in another gang, gang 30? A. Yes, sir.

1388

Q. How long were you in that gang? A. About three months, I believe, sir.

Q. Where was that gang employed? A. 57, Grace Line.

Q. The same pier? A. Yes, sir.

Q. Now, can you tell us about what the average time would be to load a cargo vessel of the Grace Line?

Mr. Taylor: Well, do you think this witness is qualified to answer that, sir?

Mr. Goldwater: I think he is from his experience. He has worked on these piers. He worked on the Grace Line piers with their ships. He said so.

1389

The Court: Are all the ships relatively uniform?

The Witness: No, sir.

Mr. Goldwater: I asked him for the average time.

Mr. Taylor: The testimony is quite to the contrary.

The Court: You mean there are all kinds of ships?

Mr. Taylor: So Mr. Goldwater says.

The Court: Ask him first to identify the ships he is talking about; and perhaps you had better



1390

*Nathaniel Dixon—For Plaintiffs—Rebuttal—Direct.*

ask him about the ships that he personally has had experience with, so that we don't have to convert him into an expert, but simply to have his observational testimony.

Mr. Goldwater: He is far from an expert, except when questioned about his work. That he knows. But I think, your Honor, that he can tell what the average time is in the period that he has worked.

The Court: If he will identify two or three or five ships—

1391

Q. You have worked, Mr. Dixon, on loading ships at the Grace Line pier on and off, as you have described it, since April, 1944. Are these ships of a different size?

A. Yes, sir.

Q. It takes different periods of time to unload and to load ships with different capacities? A. Yes, sir.

Q. Can you tell us in your experience what is the least number of days you worked on one ship, unloading?

The Court: He worked, or that it took to unload?

Mr. Goldwater: He worked. He may not know.

1392

The Court: He may have only worked on it part of the time.

Mr. Taylor: That is right.

Mr. Goldwater: If I asked how long it took to unload, the objection would be obvious, your Honor. I assume that was the basis of the other objection, that he couldn't know, that he is not an expert.

The Court: He could know if he saw. Observational testimony does not require expertness.

Mr. Goldwater: I know what I can get from him definitely from his own experience.

The Court: All right.

Mr. Goldwater: I would like to take that first.



*Nathaniel Dixon—For Plaintiffs—Rebuttal—Direct,*

1393

Q. Do you remember the question now, Mr. Dixon?

A. Yes, sir.

Q. What is your answer?

The Court: Do you want to know how long he worked personally on any one ship?

Mr. Goldwater: Yes.

The Court: The least amount of time?

Mr. Goldwater: The least amount of time; that is right.

The Court: All right.

1394

A. Loading or discharging?

Q. Well, let us take unloading first, discharging.

A. Discharging first. The least time I have worked on it is two nights, sir.

Q. What is the longest time that you have worked in unloading a ship? A. Two and a half nights.

Q. Now, what is the least time you have worked in loading a ship.

Mr. Taylor: He gave that to you, didn't he?

The Court: No.

Mr. Goldwater: No.

1395

The Court: The other was discharging.

A. At the Grace Line we have worked as high as three nights loading a ship.

The Court: What is the shortest, you wanted to know.

Mr. Goldwater: No.

The Court: The shortest amount.

Mr. Goldwater: The shortest was the first question.



1896

*Nathaniel Dixon—For Plaintiffs—Rebuttal—Direct.*

The Court: What is the shortest time you ever worked in loading a Grace Line vessel?

The Witness: Well, your Honor, the answer to that, it is hard to answer, to put it that way. If I started the ship and continued, that is one answer. I could say the shortest time would be two nights, according to what tonnage the ship is. Then again I could work on a ship two hours, just go there and finish up the mail. That is why I say it is hard to give an answer like that, sir.

1897

The Court: That is right.

Q. What is the longest time that you worked on loading a ship at the Grace Line pier? A. I said three nights I have worked on loading a ship.

Q. Now, do you know the shortest length of time that it took to unload a Grace Line ship?

Mr. Taylor: I object.

The Court: Have you ever seen a ship from beginning to end, loading or discharging?

The Witness: Yes, I have seen it from beginning to end, loading and discharging.

1898

The Court: I will let him answer the question.

Mr. Taylor: May I find out whether the witness understands that question to mean does he know the time between arrival and departure, or whether he knows the number of hours which the ship was actually being worked?

The Court: I take the question to mean the latter.

Mr. Taylor: How can he know if he was not there.

The Court: He says he saw it.

Mr. Taylor: Well, he was not there. We know he was not there.



*Nathaniel Dixon—For Plaintiffs—Rebuttal—Direct.*

1399

The Court: You mean that he went home and slept?

Mr. Goldwater: Mr. Taylor is testifying to so many things I begin to doubt whether I should begin to question him.

The Court: Wait a minute.

By the Court:

Q. Have you ever seen a ship continuously from the time it began to be worked until the time it finished.

1400

A. Your Honor, may—

Q. No; you will have to speak up louder. A. Your Honor, I can answer that by demonstrating the ship that is in there now, that left this evening at three o'clock; maybe that will help. The Santa Barbara is a new ship of the Grace Line, came in one o'clock Sunday, it started at one o'clock Sunday, rather; it came in about 11:30. And the gangs wasn't ordered out—the first gang that went out was at one o'clock, that was some of the white gang. Our orders was put on the board at one o'clock for the same day to return, to report at 7 o'clock. That ship started to load one o'clock Friday. We went to work on it seven o'clock that night, Friday night, we worked all night.

1401

Q. Until when? A. Until Friday—Saturday morning, at 6; 8 o'clock the gangs started loading that same ship.

Mr. Taylor: Where did you go?

The Witness: I went home.

Mr. Taylor: O.K.

The Witness: I know it was 10 gangs put on that ship. That is the only one that was working. It worked Saturday up until 12 o'clock. Sunday they went to work at 8 o'clock.



1402 *Nathaniel Dixon—For Plaintiffs—Rebuttal—Direct.*

Mr. Taylor: When did you come back?

The Witness: I went back Sunday night.

Mr. Goldwater: Are we cross-examining the witness now, your Honor?

The Court: He should not tell us hearsay.

The Witness: I am sorry, sir.

The Court: But I don't know what it is you are trying to develop.

Mr. Goldwater: I think it will become apparent, your Honor, in a minute.

1403 The Court: All right. Go ahead and tell us what you want to say. Then you, Mr. Taylor, will cross-examine and move to strike out all this hearsay. I will instruct the witness, however, to give us only that which he saw.

Mr. Goldwater: I assumed your Honor would, and that is why I was asking him before to testify as to the time he worked the shortest number and the longest number of hours. I am trying to stick to the rules of hearsay, and that is the reason I put the questions that way.

The Court: All right.

1404 Q. Do you know that when a ship started unloading that the gangs were continuously at work day and night until unloading was completed? A. I cannot answer that, because I honestly cannot say what I did not see.

Q. Do you know from your conversations with other men who worked on the dock whether they worked unloading during the time when your gang was not working?

Mr. Taylor: Objected to.

The Court: Sustained.

Mr. Goldwater: I supposed the rules of hearsay applied to the plaintiffs' witnesses, but they did not seem to apply without objection.



*Nathaniel Dixon—For Plaintiffs—Rebuttal—Direct.*

1405

The Court: In the absence of objection they do not apply.

Mr. Goldwater: Oh, but there was plenty of objection.

The Court: Not on the grounds of hearsay.

Mr. Goldwater: I think there was.

Q. How many regular night gangs did Huron employ, if you know, from April, 1944 until about October 1, 1945?

Mr. Taylor: I object.

The Court: You mean regular night gangs?

1406

Mr. Goldwater: Night gangs.

The Court: Do you know?

The Witness: Yes, sir.

The Court: I will let him answer.

Q. How many night gangs? A. They employed seven night gangs.

The Court: You said before from five to seven.

The Witness: From five to seven, yes.

The Court: Five normally, and seven when it was crowded, would you say; is that your answer? 1407

The Witness: Yes, sir.

Mr. Goldwater: The question was how many night gangs are employed there now, and that was his answer. The question I now ask the witness is how many night gangs were employed from April, 1944 to October 1, 1945.

Q. And your answer is seven? A. Yes, up until the strike started on October 1st.

Q. Do you know the numbers of the gangs that did exclusively night work during that time. A: I may not remember all the numbers.



1408

*Nathaniel Dixon—For Plaintiffs—Rebuttal—Direct.*

Q. Give us some you do remember. A. 18 gang, 24, 25, 26, 27, 28, 29 and 30.

Q. On that pier do you know whether day gangs were switched to night work occasionally? A. I do not recall it before October 1st. Since then there have been day gangs switched to nights.

Q. Do you know how often day gangs are switched to night work? A. Two gangs go on one week nights, and go back to the days, and two more new day gangs come on, two different day gangs every week.

1409

Q. Two different day gangs are switched to night work every week? A. Yes.

The Court: Was that the practice before October 1st?

The Witness: No, sir.

Q. What was the practice with respect to switching day gangs to night work prior to October 1, 1945? A. I did not get the question, sir.

1410

Q. Was there any regular practice before October 1, 1945, with respect to switching day gangs to night work? A. All I know is that the colored gangs had all the night work. There was not any day gangs being switched over before then.

Q. Is there as much work on these piers at Huron now, or has there been since October 1, 1945, as previously? A. No, sir; it has been quite slow lately, sir.

Q. When you were working on night work on general cargo, how much did you get per hour? A. Before October 1st?

Q. Yes. A. \$1.875.

Q. What have you gotten since October 1st?

Mr. Taylor: Wait a minute; you mean after the date of the suit?



*Nathaniel Dixon—For Plaintiffs—Rebuttal—Direct.*

1411

Mr. Goldwater: I place the date in question as October 1, 1945.

Mr. Taylor: I do not know the precise date. In the summons and complaint it has been set in October. I do not care whether it is the 1st or 5th. I am just trying to find out whether he is asking the witness as to a period after the beginning of this suit.

Mr. Goldwater: We will change the question. The suit was commenced some time in October, I do not recall the exact date.

1412

Mr. Taylor: Your Honor will have in mind that the contract, the 1943-1945 contract, which was \$1.875 an hour, expired September 30, 1945, and the new contract was executed later.

The Court: If we have got some days after October 1st we will have to know the rate of compensation.

Mr. Taylor: We have agreed, I think, that all claims involved in this suit fall within the scope of the collective bargaining agreement of 1943-1945.

Mr. Goldwater: I will state now that no claim is made for any period subsequent to October 1st, so we will simplify this issue. It is unimportant whether there are a few days after. We abandon that completely and restrict our claims up to and including September 30, 1945. I will withdraw the question and I will rephrase it this way:

1413

Q. What compensation did you get an hour for every hour of night work that you worked prior to October 1, 1945? A. \$1.875.

Q. If you worked on a premium cargo, on a special cargo, you got something in addition to that? A. Such as cement was a nickel more.



1414

*Nathaniel Dixon—For Plaintiffs—Rebuttal—Direct.*

Mr. Taylor: Such as what?

The Court: On cement, when he got five cents more.

1415

Q. Did you work Sundays during this period from April 23, 1944 to October 1, 1945? A. Yes, we worked Sundays sometimes, not all the time. On Sundays, of course, all of us like to be off, but it is a very hard thing to do. That is where I am working now at Huron. For instance, if we should work five nights or six nights a week we would like to take Saturday and Sunday off but we have a rule there for the colored gangs, if they are off Sunday night we lose a whole week, so regardless of how tired we are we work Sunday night.

Q. You mean you are not put to work on a shape-up the following week if you do not work Sunday night when there is work to be done? A. That is right.

The Court: When you say you work on Sunday, do you mean during the night hours or during the day hours?

The Witness: "No, I am referring to my job, the night job.

1416

The Court: Night hours?

The Witness: Night hours.

Q. Have you ever worked Sunday during the daytime at all? A. At the Huron?

Q. Yes. A. No, sir; I never worked no days there.

Q. Did you know that on some of the Grace Line ships at various times the company did not use night gangs in unloading at all? A. You mean some ships would work without any night gangs being used? Not since I started we have not had a blank week what I consider a blank week. What I consider a blank week is no work at all. If



*Nathaniel Dixon—For Plaintiffs—Rebuttal—Direct.*

1417

we work half a night the whole week, if we work half a night to finish up loading a ship, that is all we got for the whole week.

Q. If you went in to finish up loading a ship when did you start to work? A. 7 o'clock.

Q. Then the ship had been worked on, loading, prior to that time? A. Yes.

Q. By another gang? A. By other gangs.

Q. Can you tell me what the expression "working the ships slow" means in the stevedoring industry, "working the ship slow"? Do you recognize that expression? A. No, not exactly. "Working the ship slow"? No, it does not apply to where I have worked, anyway.

1418

Q. What about the expression "stretching the cargo"? A. We do not stretch cargo, not where I work. I know what it means.

Q. What does it mean? Let us take "stretching the cargo." A. Stretching time.

The Court: Taking it easy, making the job take longer?

The Witness: That is it, but we are rushed all the time. There is no such thing as stretching.

1419

Q. Did it ever happen to you, Mr. Dixon, that you had the experience that you described a few moments ago, that is that you did not work Sunday night and were not given work the following week on the pier when there was night work going on? A. Did it happen to me?

Q. Yes. A. Yes, twice; once on an occasion here about, I believe it has been about two months ago. I believe it was about there. My wife took very sick on a Sunday. In fact, my hatch boss was right in my house when she took sick, and he knows I could not get in. I mean I could not get down to work that night, because there was



1420

*Nathaniel Dixon—For Plaintiffs—Rebuttal—Direct.*

not anybody to take care of the kids. So I stayed home myself. I went down on a Tuesday night for the Tuesday night shape, because friends of mine that worked in the gang had came and told me they were working Tuesday night. I went down and was told I had to stay off for the rest of the week, and I did. I did not go back there to shape up, or any place else. I even spoke to what we call the union shop steward, and the answer he gave me was that "You could use a week, anyway, to rest." The only reason that he gave me was that I could use a week to rest, anyway.

1421

The Court: Are you a member of the I.L.A.?

The Witness: Yes, sir.

Q. You are a regular member of the union?

Mr. Taylor: We have stipulated that.

Mr. Goldwater: There is testimony here by Mr. Ryan that casts considerable doubt on the fact as to whether these plaintiffs were regular members of the union.

The Court: I did not hear that.

1422

Mr. Goldwater: He said they were taken in and it did not cost them anything.

The Court: I did not understand that testimony to apply to the plaintiffs. In any event, you say you are a member of the I.L.A.?

The Witness: As far as I know, yes. I paid the same as anyone else did.

Mr. Taylor: We have stipulated in this case that all the plaintiffs were members in good standing in the I.L.A. Now why do we need to go into it.

The Court: We do not.

Q. Did you have the experience of not reporting on



*Nathaniel Dixon—For Plaintiffs—Rebuttal—Direct.*

1423

Sunday and of being told you could not work the following week, on more than one occasion, or only once, the once you have described? A. I said on two occasions.

Q. Mr. Dixon, were there occasions when the board that you have described on the dock indicated that your gang was to report for work at night and you did report and that you did not go to work that night?

Mr. Taylor: Wait a moment, please. If your Honor pleases, I hope you will believe I have been trying to try this case wide open and have given you all the facts, but I do not think what is now going in evidence is rebuttal. I think it is part of the plaintiffs' case. I have sat here quietly, not knowing what Mr. Goldwater was getting at, and thinking that in some way or other he was going to connect it up with the theories or the positions, or whatnot, which we have taken, and now I think he is getting into matters which are not proper rebuttal, but which are part of his direct case, and I object.

1424

The Court: All right, justify your question.

Mr. Goldwater: I say there has been testimony offered by the defendants which would tend to indicate that the night work was not regular, that it was an exception, that it was a continuance of day work, that it was so intended that night gangs did not work regularly, and I am attempting to prove by this witness that that is so.

1425

The Court: Objection overruled.

Q. (Read.) A. From the time I have been there I remember once or twice, and the reason was the weather. We were reported to come to work, and at 7 o'clock it was raining very hard, and the stevedore waved us back.



1426 *Nathaniel Dixon—For Plaintiffs—Rebuttal—Cross.*

Cross Examination by Mr. Taylor:

Q. Have you got your Huron card with you, Mr. Dixon?

A. Yes, sir.

Q. May I see it, please? A. (Hands card.)

Q. Did I understand you to say that the reason why you knew that you first went to work for the Grace Line on April 23, 1944, was because that is the date of the card? A. Yes.

Q. You never worked for them before that time?

1427 A. No, sir.

Q. When did you first begin working as a stevedore anywhere in the port of New York? A. As a longshoreman?

Q. Yes, I mean as a longshoreman. A. I started in deep water in 1943.

Q. During the war? A. Yes.

Q. You said something about somebody taking a gang to go down to the Grace Line to work, and asking you if you wanted to go along, didn't you? A. Yes.

1428 Q. Is that the way you and some of the other men who live in the same part of the city that you do were hired; that is, you were hired up in Harlem and set down in gangs during the war? A. That has nothing to do with the part of the city I live in. This fellow that is carrying this particular gang now, that is carrying 24 gang, this particular fellow that is carrying the 24 gang now, for reasons that I do not know—that is his business—left 32. I was working in Brooklyn when he left there, and through information from some of the boys that I have worked with, they told me about this fellow had started carrying a gang up there, and the gang was split up. The stevedore at the pier broke the gang up, for reasons I do not know, but anyway I got in touch with this fellow on a Saturday evening and he told me to come on down,



he thinks he can place me and about eight other fellows, eight fellows, seven or eight fellows that we get together, we all worked together in 32. That is how this same 24 gang started. It is all men that worked together previous to the time we were there. Most of the 24 gang we work with now started on that same Sunday.

Q. Will you tell me whether or not when you did go to work for the Huron Stevedoring Corporation you were gotten together uptown and went down town and went to work, or whether you went down town and shaped at one or another of the Grace Line piers? A. I do not think you quite understand longshoring. You see, there is club gangs uptown. That is one thing where they shape uptown and go down town. I do not belong to a club gang. We shape up at the pier.

1430

Q. Whenever you went to work for Huron you went down town and went into shape and were hired from the shape? A. That is right.

Q. So I understand you tried to work for Huron. You worked more for Huron than anyone else, didn't you? A. Yes.

Q. You knew that Huron did quite a substantial volume of night work? A. Before I went there?

Q. Yes. A. No, I did not know.

1431

Q. You came to know that, to be true? A. After I worked there; naturally, anybody that worked almost two years would know it is about the busiest pier in the city.

Q. And you knew that Huron perhaps worked more overtime; more night time work, than any other piers in the city, didn't you? A. I will have to explain that a little bit.

Q. All right, go ahead. A. One reason I took night work was because —

Q. No, I do not want to interrupt you, but what I am trying to get at is, so far as you know is whether or



1432

*Nathaniel Dixon—For Plaintiffs—Rebuttal—Cross.*

not the Huron Stevedoring Corporation was one of the companies in this city, or in this port, who worked more night time work than others? A. I did not know that before I went there. Now I know it.

Q. And that is one of the reasons, I suppose, why you used to go back to Huron and try to work there, and why you got into these gangs that you told us about and used to work nights a lot at Huron, because they had quite a lot of night work to do? A. Yes.

1433

Q. Well now, you would not want the Judge to understand that you worked every week, would you? A. Every night of every week?

Q. Not every week; at least some one night in every week? A. Not only do I want him to understand it, it is a definite fact.

Mr. Taylor: Will your Honor please get out Exhibit 7, or may I hand you Exhibit 7.

Mr. Goldwater: The number at the top of the exhibit pertaining to this witness is 13,453.

The Court: That is correct.

1434

Mr. Taylor: Your Honor will notice that the period covered by Mr. Dixon's employment begins on April 17, 1944, and ends on October 28, 1945.

Mr. Goldwater: To be more accurate, it begins on April 23rd.

The Court: I think that is probably true. It is the week of April 23rd.

Mr. Taylor: That is right, there are 80 weeks. In other words, what I want to put in the record is that a comparison of Mr. Dixon's work record with the calendar will show that between the earliest week recorded and the latest week recorded there is a span of 80 weeks.



*Nathaniel Dixon—For Plaintiffs—Rebuttal—Cross.*

1485

Q. And, Mr. Dixon, I ask you if it is not true that out of those 80 weeks between the first week that you went to work and the week when you quit—

The Court: He has not quit yet.

The Witness: I have not quit.

Q. All right, the last week covered—

The Court: Down to October 28, 1945 is the last week covered.

1436

Q. That there are 17 weeks in which you did not do any work for Huron at all? A. That is right. I told the gentleman there that I worked for Bay Ridge. When they were slow I worked for Bay Ridge.

The Court: So you mean you worked some time every week for some stevedoring company, not necessarily Huron?

The Witness: Not necessarily Huron, no. I have worked some nights out of every week.

Q. There are many weeks, are there not, in the course of your working for Huron, when you worked only one day in the course of the week? For example, you started on April 23rd, which was a Sunday night, and that Sunday was the only day that you worked for them in that week; that is correct, isn't it? A. One full night. 1437

Q. And if we look at the week from October 30, 1944 to November 5, 1944, you worked only on Monday night of that week; is that correct? A. That is one night.

Mr. Taylor: I wish to say for the record, subject to correction by Mr. Goldwater if I am wrong about it, that this exhibit, which has gone in under



1438

*Nathaniel Dixon—For Plaintiffs—Rebuttal—Cross.*

stipulation, will show that during the period of this witness's employment there were four weeks during which he worked only one day.

Mr. Goldwater: One night.

Mr. Taylor: Well, I mean one 24 hours.

The Court: One working period.

Mr. Taylor: One working period of 24 hours; that there were five weeks in which he has worked only two calendar dates; that there are seven weeks under which he has worked recorded on only three calendar dates; that there are 20 weeks in which he has worked recorded on only four days; 12 weeks five days; 14 weeks six days, and one week seven days, and that the days worked per week averaged 4.22.

The Court: That is a pretty high average.

Mr. Taylor: Well, that is what it is.

Mr. Goldwater: Do you want to be accurate in your statement for the record, since you are summing up now, Mr. Taylor, and say that all of this work was done at night?

Mr. Taylor: If it is true.

1440

Mr. Goldwater: Well, you know as well as I do that it was. Why don't you make the statement complete?

Mr. Taylor: Do not accuse me of that sort of thing. Some of these plaintiffs it is true with respect to and some it is not. Now just give me a chance to look and see. There would not be any point to try to evade it, even if I was of that kind of mind. The answer is that this man's record shows no work except that type of work which is recorded as overtime.

The Court: Is \$140 the highest weekly wage you ever collected there, Mr. Dixon?



*Nathan'el Dixon—For Plaintiffs—Rebuttal—Cross.*

1441

The Witness: Yes, I believe that \$140, your Honor, is that seven nights.

The Court: I do not know, I just see \$140. Seven.

The Witness: That is the highest, sir.

The Court: You exceeded \$100 on a number of occasions, did you not?

The Witness: Yes, sir.

Q. That \$140 was for 74½ hours work? A. Yes.

Mr. Taylor: Now then, your Honor will also notice, I am sure, that the number of hours worked is recorded day by day and week by week, and, subject to correction by Mr. Goldwater, for whatever significance it may have I would like to make the statement that this exhibit shows the following with respect to the number of hours that this witness worked per week: From zero to 9 hours one week.

1442

Mr. Goldwater: I do not understand what you mean, Mr. Taylor.

Mr. Taylor: I mean the total hours was less than ten in one week.

1443

The Court: For the weekly period.

Mr. Taylor: For the weekly period. The total he worked was from 10 hours to 19 hours in four weeks. It was from 20 to 29 hours in 11 weeks. It was from 30 to 40 hours in ten different weeks.

The Court: 30 to 39.

Mr. Taylor: No, I included 40, and I included 41 to 49 in the next class.

The Court: In how many weeks was that?

Mr. Taylor: In ten weeks.



1444 : *Nathaniel Dixon—For Plaintiffs—Rebuttal—Cross.*

Mr. Goldwater: Have you any particular reason for changing your grouping?

1445 Mr. Taylor: Yes, because the next class is 41 to 49. There were 19 weeks in which his total hours were between 41 and 49, inclusive; 50 to 59 eight weeks; 60 to 69, nine weeks, and 70 to 79 one week. The average, if I have computed it correctly, is 41.32 hours per week. I do not know that the average is particularly important. It will appear in the case of this particular plaintiff that out of the 63 weeks which he worked out of the total span of 80 weeks he worked more than 40 hours in 37 weeks and less than 40 hours in 26 weeks.

By Mr. Taylor:

Q. Now, Mr. Dixon, I want to just go through your record, to see what it shows with respect to your statements that unless you went down there and worked on Sunday nights they would not let you work the next week. Now, going through this—

Mr. Goldwater: That is not what the witness said.

1446 The Court: He said if there was work on Sunday nights.

Mr. Goldwater: Yes, if he did not work when he was directed to work.

Mr. Taylor: All right. All I can point out is what the record shows. Beginning on page 1, the week from May 8, 1944 to May 14, 1944, you see there is no work recorded on Sunday and he did work during the next week.

The Court: That is right.

Mr. Taylor: Whether there was or was not work on Sunday night I do not know.

Mr. Goldwater: That is which week?



*Nathaniel Dixon—For Plaintiffs—Rebuttal—Re-direct*

1447

Mr. Taylor: Page 1, May 8th to May 14, 1944.

The Witness: Your Honor, if you even go through every sheet here you could not find that, because that has been a rule since October 1st, since we had that strike. If we go in there now, I said if we do not go in Sundays now we do not work the next week.

The Court: That did not prevail before October 1st?

The Witness: No, sir.

The Court: I am glad you corrected that, because I had the contrary impression.

1448

Mr. Taylor: I think that is all.

The Court: Any re-direct?

\*Re-direct Examination by Mr. Goldwater:

Q. Can you tell us whether there was any general practice which would affect work in a following week if you did not work on a Sunday night, when there was work, prior to October 1st? Do you understand my question?

A. No, sir.

Q. Perhaps I did not make it quite clear. Will you think now of the period before October 1, 1945. If, during that period, between 1943 and October, 1945, there was work on a Sunday night and you were told, your gang was told to work and you did not come to work, was there any rule as to what would happen to you in your work for the following week? A. No, sir.

1449

Q. There was not? A. No, sir.

Mr. Goldwater: That is all.

(Witness excused.)



1450

*Alonzo E. Steele—For Plaintiffs—Rebuttal—Direct.*

ALONZO E. STEELE, called as a witness on behalf of the plaintiffs, in rebuttal, being duly sworn, testified as follows:

Direct Examination by Mr. Goldwater:

Q. Mr. Steele, are you working as a longshoreman? A. That is right.

1451

Q. Where do you work now? A. At present I am not working for any one particular concern. I am just working wherever I can get it.

Q. Did you go to work for Huron in April 1944? A. That is correct.

Q. Did you go at the same time that Mr. Dixon went? A. I cannot remember distinctly, but I think the identification card reads April 30, 1944.

Q. Have you got your identification card with you? A. I think I have, yes, but the number is hardly legible.

Q. Does it show it was April, at any rate? A. Yes, I think you can see it.

Q. Who sent you to work at the Huron—

1452

Mr. Taylor: I object.

The Court: The objection is overruled.

Q. Who went you to work there? A. I went there to look about a shape and I got a gang there.

The Court: You went there on your own account?

The Witness: Yes, I went there on my own account.

The Court: You had been doing longshoring before?

The Witness: Yes, definitely.



*Alonzo E. Steele—For Plaintiffs—Rebuttal—Direct.*

1453

Q. Where had you been working before? A. For various companies, for Bay Ridge Operating, Union Stevedore, De Simone Stevedore and various other companies. Now, I cannot recall the names.

Q. You remember those three distinctly? A. Yes.

Q. When you went to Huron whom did you see there? A. Myself and another fellow by the name of Brantley. We went inside and saw I believe his name is Mr. Fortune and Mr. Maher.

Q. Do you know what they were on the dock? A. Mr. Fortune was supposed to be the dock superintendent and Mr. Maher, he was the head stevedore.

1454

Q. Did you have a talk with them about working for Huron? A. Yes, I did.

Q. Tell us what that conversation was. A. Well, Mr.

Mr. Taylor: I object.

The Court: I will allow it. A conversation with the defendant.

Mr. Taylor: Yes. But not properly rebuttable.

The Court: Well, I assume that it goes to the same subject matter that you raised before.

Mr. Goldwater: Of course it does. I am trying to identify the people that he talked to as the representatives of the company there as preliminary.

1455

The Court: I will allow it. Go ahead.

A. Well, Mr. Fortune and Mr. Maher were there and they told us, in fact they asked us to get five gangs for them; this is myself and this other fellow by the name of Brantley. And we told them—the reason they told us that they needed five gangs was because they were shifting a lot of ships from New Orleans, on the Grace Line ships, they were shifting a lot of ships that was coming in here on the North River that came into New Orleans and



1456

*Alonzo E. Steele—For Plaintiffs—Rebuttal—Direct.*

were going to come in here in the North River, and they would need some gangs.

The Court: How many men is a gang?

1457

The Witness: A gang constitutes 21 men with the foreman. They asked us to get five more gangs. They asked us to get more than five if we could. We hesitated and we wouldn't take but two gangs. We told them that we would bring two gangs. We asked them could we work days. And Mr. Maher told us, he said he couldn't tell us definitely whether we would work days or nights. But he said he would give me a call. And when I did get the call the call came for night work.

Q. How did you get that call, by telephone or what?

A. Yes, I got the telephone call that tells me to bring the gang down to the pier.

Q. Had you in the meantime rounded up the 20 men for the gang? A. Yes, I had. I got the call sometime—sometimes I wouldn't get the call until about three o'clock and I would have to go out and round up the men then.

1458

Q. That is, round up the men to come to work at what time? A. Well, I would shape the men up again at five o'clock, I would shape the men for the 7 o'clock shape in order to procure the men. I would have to get them at 5 o'clock.

Q. When you say you shaped them up at 5, will you tell us just what you mean by that? A. Well, you see labor was a little difficult, it was hard to get labor in those days anyway. And for me, if I went out to shape, say I supposed to start at 7 o'clock, if I went out at 7 o'clock I couldn't get no men at 7 o'clock; I would have to round them up at before 5 o'clock to get them for 7 o'clock.



*Alonzo E. Steele—For Plaintiffs—Rebuttal—Direct.*

1459

Q. You would bring them down to the shape at 7? A. That is right. I would bring them down to the pier.

Q. The record of your work which is in evidence here, the time sheet, would show that your first day of employment by Huron was on Sunday, April 30th. A. That is correct.

Q. Did you report regularly for shape at the Huron docks after that time? A. Yes, I went there to look for work. Lots of times I couldn't get it. If I couldn't get it at night I would go there in the morning. But I never could get a shape in the daytime.

1460

Q. How many times to the best of your recollection while you were working at Huron between April 1944 and September 30, 1945, did you go to the Huron docks in the daytime looking for work? A. After April 30, 1944, I carried a gang, I was hatch boss there for about I think two months, and I got some work there; I would get two nights, three nights a week, and after we couldn't get that work I tried to shape in the daytime. I did that for about two or three months. Then I stopped going to Huron altogether. And then didn't go back there until I believe February 1945.

Q. In the meantime did you go to other docks to shape? A. Yes, sir, I did.

1461

Q. What other docks did you go to to shape? A. Bay Ridge Operating, Union Stevedore, Jarka, Moore-McCormick.

Q. Did you ever get day work at any of these docks? A. Yes, I did.

Q. For any extended, continuous period of time? A. No. Sometimes once in a while I would get a week, maybe four or five days; but generally they averaged about three and a half to four days.

Q. Did you get work at night at any of these other docks? A. Yes, I did. I took it when I could get it. It was catch-as-catch-can.



1462

*Alonzo E. Steele—For Plaintiffs—Rebuttal—Direct.*

The Court: As far as Huron was concerned you never worked by day?

The Witness: I never worked for Huron by days.

Q. Now, were you familiar with the practice of posting a notice on the bulletin board at the Huron docks?

A. Yes, I was.

Q. Will you tell us about it, what that notice indicated?

1463

A. This bulletin board is a board down by the dock on Pier 57, situated, with the orders for every gang. The gangs was all numbered on that line I believe from 18 to 30. And if your gang—

Q. By the way, what was your gang number? A. No. 27. If your gang is going to work that night the number is posted on the board and you have to go downtown and find if your gang is going to work.

Q. Did you ever work in gang 24? A. No, sir.

Q. Did you work Sundays? A. Yes, I worked Sundays for Huron.

Q. Since you worked only nights that would be Sunday nights you worked for Huron? A. Yes, I worked Sunday nights for them.

1464

Q. Mr. Steele, was there any practice at Huron prior to October 1st with respect to whether or not a man would get work the following week if he did not report for Sunday night work when he was told to? A. Yes. That happened frequently. It was according to how the stevedore felt.

The Court: What would happen?

The Witness: Well, sometimes if a man didn't show up on Sunday night he wouldn't shape him on Monday night. He may change his mind. The man comes down on Tuesday night and he may shape him.



*Alonzo E. Steele—For Plaintiffs—Rebuttal—Cross.*

1465

The Court: What you mean is sometimes a man was penalized by the stevedore on the question of hiring?

The Witness: That is right. Sometimes he would penalize him for the week.

The Court: There was no general practice?

The Witness: No, not until after October 1st. There was general practice—

The Court: Not until then?

The Witness: But the practice occurred before October 1st. That is how I explained it to you.

Mr. Goldwater: That is all.

1466

Cross Examination by Mr. Taylor:

Q. Mr. Steele, when you said that you used to shape the men, will you tell me, please, where you used to shape them? A. 134th Street and Lenox Avenue. You see, when I first went—

Q. Wait a minute. Where? A. 134th Street and Lenox Avenue.

Q. That is not a pier? A. No, sir, it is not a pier.

Q. Why did you hold the shape up at 134th Street and Lenox Avenue? A. Because I had to get the labor there.

1467

Q. You had to get the labor? A. Yes, that is right.

Q. Did you know how many men you were supposed to get? A. Yes. They told me.

Q. How did you know? A. I would get the order by telephone. Sometimes I would have to go down to the pier and look on the board.

Q. So, either by telephone from the Huron Company or by going down and looking at the board and knowing that your gang number was whatever it was— 27 I think you said— A. At that time it was 33.

Q. All right, 33. —and knowing that they wanted gang



1468

*Alonzo E. Steele—For Plaintiffs—Rebuttal—Cross.*

33 to work there, that meant 21 men they wanted you to get? A. That is right.

Q. So then you would go to Lenox Avenue and 134th Street and hold the shape up there and try to get yourself that many men? A. That is right.

Q. Did you have any trouble getting them? A. Well, they would vary. Sometimes I would have trouble getting them, sometimes I wouldn't.

Q. Sometimes you would get one group of 21, sometimes you would get another group? A. That is right.

1469

The Court: You mean they were not always the same 20 men?

The Witness: No.

Q. Did you always hold your shape at Lenox Avenue and 134th Street; didn't you sometimes shape them downtown? A. Yes, I shaped downtown sometimes.

Q. In other words— A. Let me explain it to you.

Q. Wait a minute.

Mr. Goldwater: I think the witness ought to be permitted to answer the question, your Honor.

1470

The Court: If counsel wants to insist on his questions, he is entitled to do so.

Q. Under what circumstances, Mr. Steele, did you shape them downtown instead of shaping them uptown? A. Why did I shape them uptown instead of downtown?

Q. The other way around. Why did you shape them downtown instead of uptown? A. I told you before, sometimes I couldn't get all the labor downtown. That is why the stevedore came to me and asked me to get the men because he couldn't get the labor downtown at the pier.

Q. So you tried to shape them downtown—see if I get



this—knowing that they wanted a gang at 7 o'clock— A. That is right.

Q.—and you would start trying to get them together at 5? A. That is right.

Q. And you would try to get them together at 5 downtown and if you couldn't get them downtown you would go uptown; is that the way it worked? A. No. I got them from uptown. I would be down at the pier at 7 o'clock. I would start at 5 getting them together.

Q. Didn't you start getting them together at 5 sometimes downtown? A. No.

Q. Your shape, your 5 o'clock shape was always uptown? A. That is right.

Q. Well now, it is clear from your record, Mr. Steele, which is in evidence—

1472

Mr. Taylor: I assume your Honor has looked it over.

Q.—that you didn't work every day or even every week?

The Court: For Huron.

Q. (Continuing) Between the time you started to work for Huron and the time you last worked for Huron within the period of this suit. A. I did not.

1473

Mr. Taylor: For the sake of the record, and subject to correction, I should like it to appear that the period covered between the earliest date when Mr. Steele went to work for Huron and the latest date which is in evidence in this case is 79 weeks; that there were 46 of those 79 weeks in which Mr. Steele did some work, and there are 33 weeks—

Mr. Goldwater: For Huron.

The Court: For Huron; that is right.



1474

*Alonzo E. Steele—For Plaintiffs—Rebuttal—Re-direct.*

Mr. Taylor: For Huron; yes, sir.

(Continuing) —and there are 33 weeks in which he did not work at all for Huron. That there are 5 weeks, now coming to the distribution in the 46 weeks that he did work for Huron; there are 5 weeks when he worked one day, 5 weeks when he worked 2 days, 3 weeks when he worked 3 days, 15 weeks when he worked 4 days, 12 weeks when he worked 5 days, 6 weeks when he worked 6 days, and no weeks in which he worked 7 days. The average is 3.93 days per week.

1475

As to the hours worked during the weeks, 0 to 9 hours one week, 10 to 19 hours 5 weeks, 20 to 29 hours 7 weeks, 30 to 40 hours 13 weeks, 41 to 49 hours 9 weeks; 50 to 59 10 weeks, 60 to 69 one week, 70 to 79 no weeks. Average 37.99 hours.

That of the 46 weeks that he worked some time there are 26 in which he worked more than 40 hours, 26 in which he worked less than 40 hours.

That is all.

Re-direct Examination by Mr. Goldwater:

1476

Q. What did you mean when you said that you shaped up uptown? Tell us what you did. A. I proceeded to get men, to get the men for the regular shape-up at 7 o'clock.

Q. Did you go around the neighborhood and get the men that were available for work so that you could bring them down for the 7 o'clock shape-up, is that what you mean? A. That is right.

Q. Were these men all members of the Longshoremen's Union? A. That is right.

Q. Where else did you work during this period when you were not working for Huron? A. I worked for Bay Ridge, I worked for Union Stevedore, I worked for Jarka.



*James Thomas—For Plaintiffs—Rebuttal—Direct.*

1477

By the Court:

Q. Is this 134th Street and Lenox Avenue outdoors? A. That is right, it is outdoors.

Q. Just on the street corner? A. Yes, sir.

Q. The boys knew that that is where you would meet? A. Yes sir.

Q. You would go around and tell them, and hustle around? A. That is right.

The Court: All right. You are excused.

1478

(Witness excused.)

JAMES THOMAS, called as a witness on behalf of the plaintiff, in rebuttal, being duly sworn, testified as follows:

Direct Examination by Mr. Goldwater:

Q. Mr. Thomas, what is your work? A. Stevedore foreman, longshore.

Q. How long have you been working as a longshoreman? A. Since 1908.

1479

Q. Where are you working now, Mr. Thomas? A. The Bay Ridge Operating Company.

Q. Are you a member of the I. L. A.? A. Yes, sir.

Q. How long have you been a member? A. How long I been a member of the I. L. A.? 1916.

Q. How long have you been working for Bay Ridge? A. Five years.

Q. Now, you are a hatch boss? A. Well, I was hatch boss, but I am assistant foreman under Brown.



1480

*James Thomas—For Plaintiffs—Rebuttal—Direct.*

Mr. Taylor: Mr. Thomas, would you keep your voice up so that we can hear what you have to say, please?

The Witness: I am trying to do that now, if I can.

Q. Are you in charge of a gang at Bay Ridge now? A. Yes, sir. Whenever they have work I am in charge of it.

1481

Q. Were you in charge of a gang at Bay Ridge ever since you have been working there? A. Ever since I was there, in charge of a gang.

Q. What is your gang number? A. They don't run by numbers.

Q. Is there any other way that the gang is designated? A. If I got five gangs, we put them one in each hatch. But they don't run by number like the Huron people.

Q. How do you know at the Bay Ridge when your gang is to work? A. Well, Mr. Walker call up Brown, head foreman, then Brown call me.

1482

Mr. Taylor: Wait a minute, please. Is this rebuttal?

The Court: Yes, sir. I take it we are still on the same subject.

Mr. Goldwater: We are, your Honor.

The Court: Rebutting the degree of irregularity which has been suggested.

Mr. Goldwater: That is right.

The Court: All right. That is what I am listening for.

Q. Then you would get your word by telephone; is that it? A. Yes, sir, by telephone; right.

Q. Has it been that way regularly since you worked for Bay Ridge? A. For the last five years, by telephone.



*James Thomas—For Plaintiffs—Rebuttal—Direct.*

1483

Q. How is your gang told to go to work?

Mr. Taylor: What do you mean "your gang"?  
He said he ~~did~~ not have gangs.

Mr. Goldwater: Oh, yes.

Mr. Taylor: They did not have numbers.

Mr. Goldwater: Oh, yes. He said he had gangs  
but they didn't have numbers.

Mr. Taylor: What do you mean by "your gang"?

Mr. Goldwater: The gang which he is in charge  
of.

Mr. Taylor: He is in charge of five gangs.

1484

Q. Are you in charge of five gangs? A. Sometimes 15.

Q. Sometimes 15? A. Yes.

Mr. Goldwater: All right.

The Court: You had better modify your question.

Mr. Goldwater: I will.

Q. How did the gangs of which you are in charge know  
when they are to go to work? A. Well, they are called,  
if they don't call Brown.

By the Court:

1485

Q. You mean the individual man calls you? A. Yes,  
the individual man calls me at my house.

Q. On the telephone? A. On the telephone; call the  
rest of the foremen who got the gangs there. Then the  
gang, the 21 men that worked in the gang, they will call  
the foreman. That is how they get the work. They go  
down to the pier to shape.

By Mr. Goldwater:

Q. You mean they do this telephoning before they go  
to the pier to shape up? A. Yes.



\*1486

*James Thomas—For Plaintiffs—Rebuttal—Direct.*

The Court: You must have a pretty busy telephone.

The Witness: No. Everybody got your own phone, practically all the foremen got the telephone. I got mine in the house.

The Court: Yes. But they all call you up to find out whether they are—

The Witness: No, not everyone call me. Certain men will call me. The rest of the gang call—

The Court: That is just to save them the trip of going downtown to look at the board.

1487

The Witness: There is no board.

The Court: If you say there is work to do they will go down and shape?

The Witness: Yes.

The Court: If you say there is no work it will save them the trouble of going down?

The Witness: That is it.

Q. Is it a practice, after they have gone down to shape, to let the men know whether they are to return, when they are to return for continuing work? Do you know what I mean? A. How is that?

1488 Q. Suppose men have gone down to work and do work day or night, are they told when they quit when to return? A. Yes. When you knock off in the morning, six o'clock, they tell you to call for orders the same thing, call back to my house or call to the foreman's house. Mr. Walker call Brown from his office, then Brown call me.

Q. Then do they always learn from day to day whether they are to go to the shape-up or telephone you? A. Yes, sometimes they do, sometimes they get telephone orders, "Back here tonight at 7 o'clock."

Q. That is what I was asking you. They are told sometimes to come back tonight at 7 o'clock? A. Yes.



*James Thomas—For Plaintiffs—Rebuttal—Direct.*

1489

Q. You say they are told that when they knock off? A. Yes, sir.

Q. Are the gangs of which you are in charge gangs which work day or night or both? A. Well, whenever they got the night work we work nights; if they haven't got it they put two gangs working day and the rest of them in the street. That is whenever they got the work.

Q. And the rest of them where? A. In the street, doing nothing; no work for them.

The Court: You work both day and night, sometimes by day, sometimes by night?

1490

The Witness: Sometimes by day, sometimes night. Most of them is days. I work in two classes of ships.

Q. What do you mean by two classes of ships? A. Why, I work two classes of ships. One is a "reefer," frozen ships. That is all that stuff meat and stuff like that.

Q. It takes frozen goods? A. Frozen.

Q. Frozen goods? A. Yes. Then the next is a lumber ship, in New Haven, Connecticut. There is two classes of ships there.

1491

Q. When the men start to work are they employed for any continuous definite number of hours? A. No.

Q. Then they never know when they start for how many hours they are going to work? A. That is right.

Q. Mr. Thomas, before the war, in 1938 and 1940, 1941, how many shape-ups were there in the port here in New York? A. Supposed to be three but they make six out of it.

Mr. Taylor: You are asking this man before the war how many shape-ups there were in the port of New York?



1492

*James Thomas—For Plaintiffs—Rebuttal—Direct.*

Mr. Goldwater: Yes.

Mr. Taylor: Do you mean what the contract calls for?

Mr. Goldwater: No. How many there were, actually. He is going to tell us now what the actual facts were.

Mr. Taylor: How can anybody possibly answer that question?

Mr. Goldwater: He can tell you what his actual experience was.

1493

Mr. Taylor: On any particular day how many piers—

The Court: No. I think he is sufficiently well informed on the basis of his long experience to be able to tell us generally what is the condition in the port, if there is a general condition. I will allow it.

Q. Will you answer the question? A. How is that?

Q. Before the war how many shape-ups were there generally in the Port of New York? A. Shape at 8 o'clock in the morning, that is when the ships come in. Take the deck gang and get the ship rigged up. Take the deck

1494 crew—

The Court: That is not the question.

By the Court:

Q. The question is how many shapes were there. You say there is one at 8 o'clock? A. Yes.

Q. When was the next one? A. 9 o'clock.

Q. 9 o'clock there was another one? A. Yes.

Q. When was the next one after that? A. One o'clock.

Q. When was the next one after that? A. Three o'clock in the afternoon.

Q. Three o'clock? A. Yes.



*James Thomas—For Plaintiffs—Rebuttal—Direct.*

1495

Q. The next one after that? A. 7 o'clock at night.

Q. Then the next one after that? A. That is all; to 12 midnight.

By Mr. Goldwater:

Q. Have you worked Sundays? A. Yes, sir.

Q. Both before and during the period of the war? A. Yes.

Q. How would you know when you were to work Sunday? In the same manner as you have told us before, by telephone message? A. I would get orders at 11 o'clock Saturday for Sunday work. 1496

The Court: Is that 11 p. m. or 11 a. m.?

The Witness: 11 a. m.

Q. Did you ever go to shape up on Sunday during peacetime? A. Yes, sir, I did.

Q. Did it happen just occasionally or quite regularly? A. Well, when the work was there we would go to work regularly. If there was anything doing we would come back home if there wasn't no steady work to go to; look for a job Sunday morning as well as Monday morning. There wasn't any steady work. 1497

Q. Then, in your experience the effort of your gang or the people you knew in the industry was to get work on Sundays the same as every other day in the week? A. The same as every other day in the week.

The Court: You mean, to look for work?

The Witness: Look for work on Sunday; don't get a telephone call you got to go and look for work on Sunday.

Q. Now, were there any extended periods of time, Mr. Thomas, since you have been in the industry when you worked regularly days for long stretches without any



1498

*James Thomas—For Plaintiffs—Rebuttal—Direct.*

night work? A. Well, no, it wasn't no such thing. Some we worked two or three days one week, next week we don't get anything, you got to look for night work again. Maybe you catch one or two nights, you get out of that and then you got to look for day work again.

Q. Do you know of any longshore firm, stevedoring firm employing longshoremen who work only from 8 a. m. to 5 p. m. and Saturday mornings only? A. No.

1499

Q. Now, have you ever had the experience of being a part of a gang that was called out for work on a particular night and after shaping up or getting to the ship and before being put to work, being told that there was no work that night? A. No, I have started to work, work about a half hour, maybe an hour, and in the case of rain knock off there, there is no more work to be done any more after the rain starts.

Q. You say in case of rain— A. Yes.

1500

Q. Would that be the only reason that you can recall that the gang was knocked off? A. No. Got another reason there. If they ordered the gang down and the ship not there you got to go back just the same, if the ship is not in port. Sometimes they order the gang out again, the ship not there, they expect the ship to be in before the 7 o'clock shape and the ship didn't come in and the gang got to go back again.

Q. When you say the gang has to go back, go back where? A. Go back home; in the house.

Q. And report again? A. Report the next morning, or one o'clock, whenever the ship come in. If we work nights they tell you to go back home and come back tomorrow morning 8 o'clock; you come back again and look for the ship. If that ship isn't in you come back at one o'clock.

Mr. Goldwater: That is all.



Cross Examination by Mr. Taylor:

Q. Mr. Thomas, you worked for other people besides Bay Ridge, haven't you? A. Yes, sir, I did.

Q. How many other people? A. Pretty well all of them on the riverfront. Carter & Weeks, M. P. Smith.

The Court: You worked for a great many stevedores?

The Witness: Yes, a great many stevedores. Grace Line:

1502

Q. I wish you would tell us what you meant when you said that you had shapes at 8 o'clock, 9 o'clock, 10 o'clock, 3 o'clock and 7 o'clock. The reason I ask you, Mr. Thomas, is because the I. L. A. contract which we have in the court here says that shaping time should be at 7.55 a. m., 12.55 p. m. and 6.55 p. m.? A. That is right.

Q. But you say they had more shapes than that? A. That is right. If the ship come in 8 o'clock in the morning, if she didn't be at the pier 8 o'clock in the morning they will send the gang back until 9 o'clock. They would shape at 9 o'clock, 9 o'clock they shape them and not work then until 12 and if the ship not there at 12 o'clock, have a 1 o'clock shape, then they will bring them in at 3.

1503

Q. Well, you wouldn't want us to understand, would you, Mr. Thomas, that at every pier in the port of New York on every day, year in and year out, there are shapes at 8 o'clock, 10, 3 and 7? A. No, that don't count for every pier.

Q. Is this what it amounts to, that a particular company or a particular pier that expects to have a ship come in, or where a ship has come in, the first shape that happens during the day is set down under the contract at 7.55; that is what you meant by the 8 o'clock shape, isn't it? A. That is right.



1504

*James Thomas—For Plaintiffs—Rebuttal—Cross.*

Q. So that at 8 o'clock whatever men there are going to be—or may do work at that pier on that morning, they gather around? A. Yes.

Q. Then if the ship is late or there is a fog or it is raining or something so that they don't want to hire any men at that time, that is what you mean that they then say, "Come back at 9 o'clock"? A. The stevedores will send the men back to the ship at 9 o'clock. The ship is there.

1505

Q. If they can't get them to work at 9 they say, "Come around at 10, maybe we can get going at 10"? A. "Come back at one o'clock."

Q. Didn't you say 10—

The Court: No.

A. One o'clock. I told you 8, 9 and 1.

Q. 3 and 7, is that right?

The Court: And midnight. There were five or six you mentioned.

Mr. Goldwater: That is five.

The Court: Is that five? All right.

1506

Mr. Goldwater: 8, 9, 1, 3 and 7.

Q. But in each instance what happened was that when the men came back hoping that the steamer would be in and they would want them to work, why, there would be a shape; they were not actually ordered back but they were ordered to come back to look? A. Ordered to come back looking for a ship, yes. They were ordered back for a shape.

Q. That happened all over the port? A. Practically all over the port, as far as I have been.

Q. You are not talking about a situation where the men having gotten together at a particular shape are told



*James Thomas—For Plaintiffs—Rebuttal—Cross.*

1507

definitely to go to work at a certain time, are you? A. I was told to come back at that pier at such and such an hour.

Q. What I am trying to get at is whether you are talking about a situation where the men having shaped at a particular hour, we will say 7.55 in the morning, they are then told to come back at 9 o'clock to go to work or told to come back at 9 o'clock to shape again? A. Yes.

Q. Which do you mean? A. If the ship is not there for 8.55—

Mr. Goldwater: 7.55.

1508

A. (Continuing) —7.55, they order the gang back for 9 o'clock.

The Court: To work or to shape?

The Witness: To go to work at 9 o'clock, the ship will be ready, to go to work at 9 o'clock. If the ship isn't there at 9 o'clock you will come in at one.

Q. In other words, you have a shape at 8 o'clock at which you either take them on or you say, "Come back to work at 9"? A. That is it.

1509

Q. And if they don't go to work, if they are not ordered to work at 8 o'clock or ordered in at 9, then the next thing that happens is they shape at one o'clock? A. Yes. If it is not at one—

Q. At one o'clock they either set them to work or else they say, "Come back and go to work at 3"? A. Yes, sir.

Q. If they don't do it at one o'clock then the next shape happens at 6.55 in the evening? A. 6.55.

Mr. Taylor: I don't think I have any further questions.



1510 *James Thomas—For Plaintiffs—Rebuttal—Re-direct.*

Re-direct Examination by Mr. Goldwater:

Q. Mr. Thomas, do you know whether the stevedoring companies in the port of New York during peacetime worked regularly nights throughout the city? A. Yes, I know of quite a few of them. I know M. P. Smith were one and Ward Line was the second. That is the Cuban Mail Ship Company.

The Court: You know some companies worked pretty regularly nights?

1511

The Witness: Yes.

Q. In answer to Mr. Taylor's question a minute ago about the men coming to shape at 7.55, you said that they might be told to come back to work at 9. Now you don't mean by that, do you, that when they were told to come back to work at 9 that they were paid for time from 9 o'clock on? A. When they come back to work and start at 9 o'clock they get paid from 9 to 12.

Q. If they start at 9? A. If they start at 9.

Q. But when you said they were told to come back to work at 9 and if the ship were not ready when they came back at 9 they were to come back at one, in that case they would get no pay for the morning, would they? A. No pay, no pay. That is it.

1512

Mr. Taylor: I don't know about that. The contract—

Mr. Goldwater: You may not. The witness says he does.

Re-cross Examination by Mr. Taylor:

Q. I have here this little book. You have seen it before, haven't you? A. I think I have.



*James Thomas—For Plaintiffs—Rebuttal—Re-cross.*

1513

Q. It says in here, "When men are employed at 8 a. m. to 1 p. m. or are ordered out for another hour during the morning or the afternoon on any weekday from Monday to Friday inclusive they shall receive a minimum of two hours pay for each period they are employed or report for work when so ordered out, regardless of whether conditions, unless the ship or the hatch in question, or employees complete discharging or loading in less time." Is that the way it was done? A. The way you got it in the book, if the men start to work they make two hours if they knock them off. They don't give you no such two hours when they order you out in the morning, they don't give you the two. That is in the agreement; you don't get it.

1514

Q. If you go down there at 7.55 to shape and they don't hire you and they don't order you to come back to go to work at 9 o'clock or any other time, you don't get any pay? A. No.

Q. But supposing at the 7.55 morning shape they say, "Come back and go to work at 9," then what happens in the matter of pay?

The Court: In case there is no work to do at 9.

1515

A. In case there is no work you don't get paid. But if they start in at 9—

Q. If you do start in, why, you get two hours pay whether you work two hours or not, except in case where you finish the ship in less than two hours? A. You get paid from 9 to 12 if they lets them know. If they don't let us know, you have the ship give up, you give up—

Mr. Taylor: I don't know that it is very important.

The Court: All right.

(Witness excused.)



1516

*Louis Carrington—For Plaintiffs—Rebuttal—Direct.*

LOUIS CARRINGTON, called as a witness on behalf of the plaintiffs, in rebuttal, being duly sworn, testified as follows:

Direct Examination by Mr. Goldwater:

1517

Q. Mr. Carrington, were you engaged in longshore work in New York Harbor beginning about 1942? A. Well, I wouldn't give any exact date, because I have a record, I looked for it, and, I mean, I don't want you to back me with the date because I can't give it. I don't remember any definite date. But I have been working right after the war started. In other words, the job I was working on closed down for the war and I went longshore.

Q. How long are you working at longshore work? A. Until October, until the strike, which was October 3rd I think or 1st.

Q. 1945? A. Right.

Q. You are no longer engaged in that work? A. No.

Q. During that period did you work for Bay Ridge? A. In and out. I worked for Bay Ridge more than anybody else in the later years.

1518

Q. What other companies did you work for in the port of New York? A. I would say seven. I mean, I got seven. Anyway, four or five.

Q. Suppose you give me the names of those that you can remember. A. Carter-Weeks, Moore-McCormick, I worked for them quite a while. I worked a bit for Jarka and DeSimone, that is No. 2 Broadway. And I worked for Union Stevedoring and United States Lines. That is the last one I worked for. And I guess that should be enough. I could keep on going. I don't know how many more. I have the cards in my pocket, a lot of them.

Q. Who was the foreman under whom you worked at Bay Ridge? A. I practically worked for different ones. I worked for a fellow by the name of Fields.

Q. Did you know Crown? A. Brown was the big boss over most of the colored gangs or all the colored gangs.



Q. How were you told when there was work for you to do? A. Well, it was—do you want me to go into details?

Q. Yes. You tell us how you would know how you were to go to work. A. For instance, if we were going to work today, well, some of the boys would call—mostly I did, I never called anybody else's house because there was men that married, who had a family, he didn't want the Mrs.—you know, they might think you were calling up for something else; so I was calling the union. The boss calls Mr. Brown, that is Mr. Brown calls, or the foremen, and relay it to the union for the others. Mr. Brown would tell his foremen. Then he would call up Mr. Pollack, secretary of the union. Then the people like me who didn't want to call up the boss's house would call the union. But I had to call 4 or 5 o'clock I think it is, I am not sure of that, but I think, if I would get the call; before 5. That is how I find out if I am going to work.

1520

Q. Did you work days or nights or both? A. It was practically even with me, practically even.

Q. Notwithstanding these telephone calls, did you go to shape up before you worked? A. If I made the call and they say you are going, then you can get work there. But that is just—with me calling up every day, most of the time you have that call, you work. But in many cases you don't. Then if you call and they say "No," you have a chance to go some place else and shape.

1521

Q. If you call and they say there is no work, then you could go somewhere else and shape? A. That is right.

Q. Did you go to other places to shape when you found out there was no work in Bay Ridge? A. Well, proof enough, I had about 15 cards. In other words, when I turned in for income tax I turned in 27 of them and the man that filled it out for me got disgusted I think. I know it was over 19.

The Court: Different companies?



*Louis Carrington—For Plaintiffs—Rebuttal—Direct.*

The Witness: Right. And that goes into the income tax, and the man that made it out he got disgusted.

The Court: In other words, your income tax for one year, you reported income from 19 different stevedoring companies?

The Witness: Different companies. When I visited there. Because I had a lot of trouble with the man that fixed it up; he wanted to put me in jail almost for giving them to him. And it was the day before the last day.

Q. Those nineteen employers were all stevedoring companies? A. Yes, sir. I never worked nowhere else since the war. I only had two jobs in New York, that is sandhog and longshore. I never did anything else.

Q. Your first job was the longshore work? A. No. The first was sandhog, and then the war closed sandhog, closed the hole, and I had to go longshore. I had no choice.

Q. Since you have left the longshore work have you gone back to the sandhogging? A. That is right.

Q. Well now you say that your work was practically about even day and night work? A. That is right. I imagine so. I wouldn't say exact.

Q. Well, you are giving your best recollection? A. As near as I could figure, yes.

Q. You know that you worked a considerable amount day and a considerable amount night? A. That is right.

Q. And did you work when you were working nights one night after another, straight running, and no daytime in between? A. Well, that just depends. Most of the time they put it in this way. You would go to work here to-night, like especially if you were working for Bay Ridge, if you were working for Bay Ridge which employed a lot of gangs, we was working here tonight, maybe 86 tomorrow night, maybe say, "All right, quit, you got to go to the paper ship, the next ship."



*Louis Carrington—For Plaintiffs—Rebuttal—Direct.*

1525

Q. What do you mean by 86? A. They had 5, I mean to say we are at 5—no; 97, 96, 95, 86, and they also worked at 68. Now—

Q. What are those? Different piers? A. Those are different piers. So you could be sent to either one, you know, one or the other.

Q. And you might be told to knock off at the end of a night's work at one place to go to another pier the next night? A. And you might not go either place, no place the next night. And you would call for orders. It was a miracle to know tonight where you would go tomorrow.

Q. You mean it was an unusual thing that you knew at the end of your night's work where you were going to work the next night? A. If you asked anybody when you went out, they say, "Call for orders"; that is what you got. That was very—once in a while that other occurred, they say, "Come back here tomorrow night, boys."

1526

Q. Did it occur to you on frequent occasions that you worked long stretches beginning at the night shape-up and continuing through the next morning and part of the day? A. Will you say that again, please?

Q. Did it happen to you on frequent occasions that you started with the night shape-up and worked straight through the night and a considerable portion of the following day? A. Oh, I did that, I think quite a few times. I have been in a night and worked through the next day, or any day, worked through the next night. And I recall one time at 86 I think I worked a day at 86, a night at 97, a day until 10 o'clock the next night back at 86. That is the time I bust the boom. I shouldn't forget.

1527

Q. The time what? A. I shouldn't forget it. Bust the boom. They almost hooped me for that, so I shouldn't forget that.

Q. Well now during the war period was it a common thing for a Bay Ridge gang working in the daytime to stop working at 5 or to work through after 5? A. They didn't stop until—the men just got—



1528 *Louis Carrington—For Plaintiffs—Rebuttal—Direct.*

Mr. Taylor: How does he know?

The Witness: What I am talking about, I am talking about myself.

Mr. Taylor: He says he didn't go to longshore after the war.

The Witness: You say before the war?

Q. I said during the war. A. Well, I worked there at night, and they had no reason to stop, or they never did stop particularly; they would let you work as long as you want to or as long as you could.

1529 Q. You continuously worked, starting in the morning, if you started in the morning, and went right through until the job was finished? A. Until the next morning, if you was able to, or until the next night; that is, if the conditions that prevailed—you know what I mean, if they had freight.

Q. If they had freight? A. If they had freight.

Q. If there was loading or unloading on that ship to be done? A. To make it plain, if they had freight and you were dumb enough to work also and continue on. That is the way they would let you do; as long as you were able to keep lifting, you say all right, keep lifting.

1530 Q. Did you ever hear the expression at the end of a period of work "supper and back"? A. That was a common thing.

Q. What did it mean? A. That was when you worked 11 o'clock; but Bay Ridge didn't do that so much. A lot of other companies did that. For instance, Moore-McCormick was famous for that, because they didn't want to employ a lot of night gangs. Bay Ridge wasn't high on that; they did it occasionally, but not often.

Q. What did that mean with respect to hours? A. You got out at 6, eat and come back to work until 11. So, four hours you work. 11. Yes.

Q. You go out at 6, eat and you come back and work until 11? A. That is right.



Q. That is when you were working the day shift? A. That is right.

Mr. Goldwater: That is all.

Mr. Taylor: Your Honor might care to look at the group of papers which is marked Exhibit 8. That exhibit, if your Honor please, is in two parts. There are those sheets which you have immediately in front of you then there is the group of ten pages.

The Court: Which one do you want me to look at?

Mr. Taylor: I want you to look at both.

1532

Now, on this group of smaller sized sheets, your Honor, Mr. Carrington's page apparently shows one illustration of what he calls out to supper and back to 11, or out to eat and back to 11, whatever it is, on Wednesday of that week. Otherwise in that week he seemed to have worked—well, you see, Monday he worked through the regular day, Tuesday he worked through the regular day.

The Court: What is "L" and what is "LB"?

Mr. Taylor: "L" is "longshore"; "LR" is "longshoremen handling refrigerated cargo."

The Court: And "LB"?

Mr. Taylor: Where is that?

1533

The Court: The first column.

Mr. Taylor: It is "LR" on mine. "LB"?

Mr. Goldwater: I think your Honor hasn't the sheet that Mr. Taylor is referring to.

Mr. Taylor: For Mr. Carrington?

The Court: I have Carrington's.

Mr. Goldwater: You have two different weeks for Mr. Carrington. There must be another sheet there, your Honor, similar in form but a different week for Carrington.

The Court: All right.

Mr. Taylor: While the witness is here we might perhaps say a word about these.



*Louis Carrington—For Plaintiffs—Rebuttal—Direct.*

The Court: Go ahead.

Mr. Taylor: You see on the first of those smaller pages which are bound together you have your code.

The Court: I see it.

Mr. Taylor: So that in the case of Mr. Carrington in this particular week, on Monday he worked on refrigerated cargo as longshoremen from 8 in the morning until noon, then from 1 to 5 at \$1.45 an hour. On Tuesday he began at one in the morning.

Mr. Goldwater: That is really 8.

Mr. Taylor: We had to correct that. That should be 8 a. m.

Mr. Goldwater: Will you correct it on your Honor's copy? Will you please correct it to 8 a. m.?

Mr. Taylor: On Tuesday the same thing as on the previous day, except that in the afternoon, on Tuesday, he was working as an ordinary longshoreman and not on refrigerated cargo, which means that the rate was \$1.25 instead of \$1.45. And on Wednesday he worked as a longshoreman, 8 a. m. to noon and 1 to 5 and through the supper hour until 6. And continued on then at 7 on refrigerated cargo until 11 o'clock, giving him 8 hours at \$1.25, one hour at \$1.87½, which was the supper hour, and four hours at \$2.07½, which is the contract overtime rate for refrigerated cargo.

Mr. Goldwater: 5 to 6 is not the supper hour. I think you are mistaken, aren't you, Mr. Taylor?

Mr. Taylor: Yes, I am. It is an overtime hour, but not a meal hour.

The Court: All right.

Mr. Taylor: Now, if you will look at the other sheet which relates to Mr. Carrington, which is part of the same exhibit—

Mr. Goldwater: Why don't you follow through that week, because it shows the variation.



*Louis Carrington—For Plaintiffs—Rebuttal—Direct.*

1537

Mr. Taylor: If you want me to.

Mr. Goldwater: The witness has testified to Thursday of that week, that he started at 7 p. m.

Mr. Taylor: On Thursday he worked on refrigerator cargo as a header; that is the "Hr" symbol, from 7 o'clock in the evening to midnight, and from 1 o'clock in the morning until 7 in the morning; and on Friday, the following day, he was off until 7 in the evening, when he went to work and worked as a longshoreman on refrigerated cargo and worked until midnight, and continued on that kind of cargo from 1 a. m. to 7 a. m. On the larger sheets which go to make up Exhibit 7 you have a summary for each one of the ten selected plaintiffs, ten or eleven, whatever it is, in the suit against Bay Ridge.

1538

The Court: All right.

Mr. Taylor: You will notice that there are a number of weeks in which there is very little detail given, that is, entries only as to the date on which the week ends, the pier number on which the man worked, his check number, and then over under the column "Total Hours" a figure. As these sheets are made up, where he worked less than 40 hours in the work week the detail is not filled in. So that it is easy to see how many weeks he worked more than 40 and how many weeks he worked less than 40 hours. To get the distribution within the week you look under the various columns. You have the same symbols which are described in the other part of the exhibit. Under the column headed "A" you get what in the contract is the straight time hours, 8 to 5, except the noon hour. You only get totals, however, and you get the rate; and then you get an extension of the hours times the rate; and then you get, under column "B" the overtime hours under the contract, the applicable rate, and then the extension, the total hours straight time and overtime and the total pay.

1539



1540

*Carl S. Carter—For Plaintiffs—Rebuttal—Direct.*

I do not know that these things are particularly important, unless and until we know how we are going to figure this pay, but they are the records which are available and show at least something in connection with the frequency and extent of the work of each one of the selected plaintiffs.

1541

Mr. Goldwater: There is, your Honor, another week shown for this same employee, the one your Honor was looking at before. That, your Honor will see if you will look at it, is an entirely different pattern from the work week of this same plaintiff which Mr. Taylor went through day by day.

The Court: I see it.

(Witness excused.)

CARL S. CARTER, called as a witness on behalf of the plaintiffs in rebuttal, being duly sworn, testified as follows:

Direct Examination by Mr. Goldwater:

1542

Q. Mr. Carter, how long have you worked as a long-shoreman? A. I started in 1922.

Q. How long have you been with Bay Ridge? A. Since 1943.

Q. Did you work days, nights, or both? A. I worked both; right now mostly night work.

Q. Did you work for any extended period regularly only days? A. When we go to New Haven to load ships we work ten to 12 days loading a ship. That is as long as I worked. That was day work, in New Haven.

Q. In New York port did you work long stretches like that on day work? A. No, sir.

Q. Did you work any regularly long stretches of ten to 12 days night work in New York? A. As much as seven nights on a stretch, seven to eight nights on a stretch.



*Carl S. Carter—For Plaintiffs—Rebuttal—Direct.*

1543

Q. Did you work many long stretches of seven nights?

A. In 1944 there was quite a few of them.

Q. In 1943 and 1944, and up to October 1, 1945, did you work on occasions during the daytime and continue into the night? A. Yes, from 1943 I worked occasions daytime and on into the night.

Q. And did you on occasion, on any of those nights, start at night and work through until morning? A. Start at 7 and work until the next morning?

Q. Yes. A. Yes.

Q. Did you on occasions start at the night shape-up and work through the night and part of the next day? A. All the next day, yes.

1544

Q. You did sometimes work all of the following day? A. Yes.

Q. Was that a common or an uncommon thing, for men who worked starting at the night shape-up in the port of New York in the years 1943, 1944 and 1945? Was that a common or uncommon practice, to start at 7 at night and work through the night and part of the next day? A. I do not know whether it was common or not, but I have done it many times.

Q. Did you work for any companies besides Bay Ridge since 1943? A. No, sir; I worked for Bay Ridge only.

1545

Q. Were you a hatch boss? A. Yes.

Q. Did you have a regular gang that worked with you? A. I had 21 men, but they did not all work with me every night. Some might not come, and I got another man.

Q. But you had to recruit or get together a full gang for every day or night work? A. Every night I had a gang of 21, yes.

The Court: Did you do the picking from the shape?

The Witness: Yes, I picked my own 21 men.

The Court: Did that 21 include yourself?



1546

*Carl S. Carter—For Plaintiffs—Rebuttal—Direct.*

The Witness: No, sir; I was the 22nd man. You count 21 men to work.

Q. Now, did you during these years prefer day work or night work, Mr. Carter? A. Which I prefer?

Q. Yes. A. I would prefer day work.

Q. Did you try to get day work? A. You see, I have a gang, and I was ordered out. If you ordered me at night I came, and if you ordered me in the day I came.

1547

Q. You mean you did not go out to shape until you got ordered out? A. I was called up every evening, to let me know whether I was going to work that night.

Q. Who called you up? A. Mr. Brown.

Q. You have been in the courtroom here while the other witnesses testified? A. Yes.

Q. Is that the Mr. Brown that one of the witnesses said was the big boss? A. Yes.

Q. And you waited until you got orders from him? A. He 'phoned every day around 2 or 3 o'clock.

1548

Q. When he did how did you let the men in your gang know they were to come to work that night? A. My men practically had my telephone, and they called me between 4 and 5, and I would tell them what pier we was going to that night.

Q. Did you work many Saturdays and Sundays and holidays during 1943, 1944 and 1945? A. If the work was there we worked.

Q. Would you say that in this longshoremen's work Sundays and holidays were just like any other day? A. Yes.

The Court: You mean there was just as much work available on Sundays and holidays as there was on other days of the week?

The Witness: It was the same. There was no difference from any other day.

The Court: I would like to know whether, as a



*Carl S. Carter—For Plaintiffs—Rebuttal—Direct.*

1549

matter of fact, there were as many jobs open on Sundays and holidays as there were on other days?

The Witness: Bay Ridge was just the same.

The Court: Was that before the war?

The Witness: Before the war we were coastwise at Pier 25. It was not considered as deep water. I was coastwise.

Q. If you started work on a ship, loading or unloading, on Friday, and the job was not finished at the end of your Friday night shift, did you continue to work during the day on Saturday? A. If I started to work Friday night and the job was not finished, then I would come back Saturday?

1550

Q. Yes. A. I came back Saturday night, if I was working on the night shift.

Q. You mean if that ship was not loaded or unloaded by the time the day gang was finished on Saturday, then your night gang returned Saturday night to continue? A. Yes.

Q. And if the ship was not finished when you finished on Saturday night, your Saturday night shift, did you return on Sunday night to continue? A. Yes.

Q. Would you say then that what determined whether you worked Saturday or Sunday was whether the ship was completely loaded or unloaded, as the case might be? A. If the ship was not finished you came back to work Saturday or Sunday.

1551

C. During these nights did you quit on Friday night after a night's work and come back to the same ship on Monday night to work? A. What do you mean, stay over Saturday and Sunday night?

Q. Yes. A. No sir; if you worked Friday night we was back Saturday night.

Q. Until the job was completed? A. Yes.

Q. Did it ever occur, in the course of your experience in the years, that you were told to come down to a 7:55 shape up, and having brought your gang down you found there was no work there? A. Yes.



1552

*Carl S. Carter—For Plaintiffs—Rebuttal—Direct.*

Q. Did it happen infrequently, or quite a number of times? A. With my gang that did not happen so many times, but we was down quite often, not too many times.

The Court: Occasionally?

The Witness: Yes, occasionally.

1553

Q. Were you told the reason when you got there, or did you see the reason why there was no work when you got there? A. We was told there was no freight, or maybe the ship would not be there; she was expected and she had not come in, or something like that.

Q. When were you told to report back, under those conditions? A. We were told that night. Maybe sometimes they would say to shape at 8 in the morning. I was to call for orders. That was for tomorrow night.

Q. My attention is called to the fact that my question asked whether you went to shape at 7:55. I meant 6:55 at night.

The Court: You meant in the evening?

Mr. Goldwater: I meant in the evening.

1554

Q. That is the regular shape. That is 5 minutes to 7. I intended to indicate the night shape, and that is what hour? A. Five minutes to 7.

Q. I think I said 7:55. Do you know, Mr. Carter, whether during the war longshore and stevedoring firms in the port of New York worked regularly night time?

Mr. Taylor: He said he worked only for Bay Ridge.

The Court: That is correct.

Mr. Goldwater: Maybe he knows otherwise.

The Court: I have no objection to your question, but as a practical matter I have tables which show



*Carl S. Carter—For Plaintiffs—Rebuttal—Direct.* • 1555

exactly how much time was worked day and night, evening, morning, Sunday and Saturday, by a great many concerns; and I am not going to be guided very much by a general impression.

Mr. Goldwater: I withdraw the question.

Q. How long have you been a union member of the I.L.A.? A. The I.L.A., 1936.

Q. You still are? A. Yes, sir.

Mr. Taylor: No questions.

1556 •

(Witness excused.)

Mr. Goldwater: If your Honor pleases, I have some sheets which are the time sheets for Nathaniel Tolbert, one of the plaintiffs, which were furnished us by Mr. Taylor, as the others were, which are marked Plaintiffs' Exhibit 8, but which came late. They were not quite ready when the others went in. I would like these sheets, showing the weeks worked by Tolbert at the piers he worked and the hours he worked, and the sheets showing the specific hours worked in the week beginning Monday, March 27, 1944 and ending April 2, 1944, marked as part of Plaintiffs' Exhibit 8.

1557

The Court: All we need to do is incorporate it in the same folder.

Mr. Goldwater: Very well, it simply goes in the same folder.



1558 *Nathaniel Tolbert—For Plaintiffs—Rebuttal—Direct.*

NATHANIEL TOLBERT, called as a witness on behalf of the plaintiffs, in rebuttal, being duly sworn, testified as follows:

Direct Examination by Mr. Goldwater:

Q. Mr. Tolbert, you live at 246 West 112th Street, New York City? A. I do.

Q. Where are you working now? A. Bay Ridge.

Q. As a longshoreman? A. As a longshoreman.

Q. How long have you been working there? A. I do not know exactly the date.

1559 Q. Well, approximately; three years, four years? A. About three years.

Q. Did you work for any other concern during the period in 1943-1944, up to October 1, 1945, as a longshoreman? A. I did.

Q. What other concerns did you work for? A. The Bull line in Brooklyn, and I worked for M. P. Smith out in Bayonne, and in Staten Island I worked for M. P. Smith out there. They had a pier out there.

Q. For Bay Ridge did you work days or nights, or some of both? A. I worked some of both, because I could not get day work. I had to take it when I could get it, and the biggest work there was nights.

1560 Q. Did you shape up days at Bay Ridge on more than one occasion? A. Sometimes I would be working at night and worked through the next day.

Q. Did you ever go to Bay Ridge in the morning to shape up for day work? A. Yes, I did.

Q. Did you get day work? A. I did not get day work, and I came back and shaped up for night work and got night work.

Q. Were you a member of a regular gang at Bay Ridge? A. A regular gang?

Q. Yes, and did you work with the same group of men, the same gang of men regularly at Bay Ridge? A. Yes, I worked in a gang.



*Nathaniel Tolbert—For Plaintiffs—Rebuttal—Direct.*

1561

Q. Well, a gang of the same men? A. Yes, the same men.

Q. When you started working nights you say you sometimes worked through into the following day? A. That is right.

Q. And you worked more nights than days? You said mostly nights. A. Mostly nights, because you could not get day work then very much.

Q. How were you advised when there was work to be done at Bay Ridge? A. I called the union hall.

Q. What would you be told? A. I would be told when there was work there, and sometimes I would go to the pier. I would go down and get a ship. If I called them up and they said no work I would go down to the pier anyway and shape.

1562

Q. What other piers did you go to during the years 1943, 1944 and 1945, to look for work and shape up, besides Bay Ridge? A. The Grace Line, the Bull Line, M. P. Smith out in Bayonne and out in Staten Island.

Q. Were you ever told to come down for a shape up, and when you got there you were told there was no work? A. Yes, sir; I did. I would come down and shape up and get the little badge what they give me and went into the pier, and they had us to shape up to go to work. They sent us out on the pier and they say, "Come back at 9 o'clock". And we come back at 9 o'clock and they say, "You ain't getting no time, come back at 1 o'clock."

1563

The Court: Did that happen often?

The Witness: That happened on two or three occasions down to Bay Ridge.

Q. Are you speaking now of day work or night work? A. This was day work, but I have been shaped and went down to do night work at the pier called 10, and did not work, and they sent us back home. We did not go in the



1564 *Nathaniel Tolbert—For Plaintiffs—Rebuttal—Direct.*

pier and work. They did not give us no badge, but these times we went in and they give us the badge and they did not give us no work. The timekeeper that checked us in said, "You will not get paid", and sent us out.

Q. You say you have also gone down to shape at night after being told to report? A. After being told to report.

Q. And then found no work? A. That is right.

Q. Were you told on those occasions to come back the same night, or to report the next night? A. When you go down at night to shape and you do not shape at night, they do not tell you to come back that night.

1565

Q. What would you do, wait until you were told to come again? A. No, I would go out the next morning looking for a shape.

Q. Were you able to find a shape the next morning on frequent occasions? A. No, I did not find no day work much down to Bay Ridge, until we started going to New Haven on the lumber. You know, we was loading lumber ships in New Haven. That was the biggest day work we did. That would be all day work up there.

Q. At New Haven what time did your day work start in the morning? A. 8 o'clock in the morning.

Q. What time did you get through, regularly, in the evening? A. 7 o'clock at night.

1566

Q. At New Haven did you go through a night when you started on day work? A. No, we did not start—we did not work no nights up to New Haven.

Q. You did not do any night work up there at all? A. Only I think once or twice we was finishing a ship and worked all night to finish, you know.

Q. Did that happen, you say, once or twice only? A. Once or twice; that is right.

Q. You stayed on the job until the ship was finished? A. Start 8 o'clock in the morning and stay until 7 the next morning. All the gangs did not do that. I think there was only one or two gangs that did that.



*Nathaniel Tolbert—For Plaintiffs—Rebuttal—Direct.*

1567

Q. Here in the port of New York what other stevedoring companies did you work for besides Bay Ridge?

The Court: He has answered that question twice.

Mr. Goldwater: Has he, your Honor?

The Court: That is my impression. He said the Bull Line, Staten Island M. P. Smith.

The Witness: That is right.

Q. Did you say whether you worked day or night for the other stevedoring companies? A. At the Bull Line I think it was days, and in Bayonne I worked days for M. P. Smith.

1568

Q. You worked no nights for the Bull Line? A. Yes, I worked nights out to the Bull Line one or two nights. I say I did work one or two nights out to the Bull Line.

Q. Was that one or two nights work beginning at the evening shape-up, or was it a continuation of the day work? A. No, at the beginning it was the evening shape-up. It was not straight through.

Q. Would you prefer to work day or night work? A. I would rather work days if I could get it and make enough money to live.

The Court: Even if you get better pay at night?

1569

The Witness: Yes, sir; that is why I work at night.

The Court: Notwithstanding, you would rather work days at the lower rate than nights at the higher rate?

The Witness: If I could get it I would rather work days, because nights were made to rest. I would be home with the family.

Q. In your experience as a longshoreman, would you say that there were any regular hours of work at Bay Ridge? A. Not as I know, because if you start and the



1570 *Nathaniel Tolbert—For Plaintiffs—Rebuttal—Direct.*

cargo run out or get through with the ship, why, they want to knock you off they do it. You only work about an hour. If you work one hour and they want to knock you off, they knock you off. I went down and worked four hours and they knocked the gang off and there was work there.

Q. You say that there was work there when you were knocked off? A. That is right.

1571 Q. Were you told by the foreman why you were knocked off on such occasions? A. He did not tell. He just said the gang was knocking off. And the reason I say there was work there was because the car we was working was meat. We was working on meat, and there was more meat in the car when we knocked off.

Q. Was that loading meat from the car into a ship? A. Yes; it was taking it into the ship. I was working in the car.

Q. Did you work at Bay Ridge for any single long stretch of nights in a row? A. Yes, I did.

Q. How many nights can you remember working on a single stretch? A. Oh, I guess about 14.

Q. You say you did work in New Haven on day shift? A. That is right.

1572 Q. Do you recall having worked a full week on day shift and following that working a Saturday morning? A. That is right.

Q. By "full week" I mean from Monday to Friday? A. I know.

Q. And then Saturday morning. A. That is right.

Q. You know what the day rate was? A. \$1.25 an hour.

Q. Do you know what the night rate was, the overtime rate, so-called? A. I know the higher rate they were paying then was \$1.875, but we did not get that for no Saturday morning pay. If you worked 40 hours you did not get that until after 44 hours. That was after 12 on a Saturday they paid us off.



*Nathaniel Tolbert—For Plaintiffs—Rebuttal—Cross.*

1573

Q. You mean now that you worked at New Haven 40 hours from Monday to Friday during the daytime, between 8 and 5? A. That is right.

Q. And then a Saturday morning for four hours and were not paid \$1.875 for Saturday morning? A. That is right.

The Court: When was that, in 1943?

The Witness: In 1944.

The Court: Do the records sustain him? You have got his work sheets.

Mr. Goldwater: The time record for this witness would show for the week ended March 19, 1944, a total of 43 hours of straight time and no wage hour adjustment. On the sheet your Honor has in evidence the week ending April 2nd shows 44 hours at \$1.25, with a wage hour adjustment of \$2.50.

1574

The Court: And one week shows no adjustment, and one week does show adjustment; one week right after the other.

Mr. Taylor: Three weeks of this character.

The Court: Is there any explanation of the week which does not show the adjustment?

Mr. Taylor: Surely.

1575

The Court: All right; we will let it be developed. I did not want to impeach the stipulation, but this does not impeach it.

Mr. Goldwater: That is all.

Cross Examination by Mr. Taylor:

Q. Do you happen to know, Mr. Tolbert, on those few occasions when you were working at night for Bay Ridge and they knocked you off in three or four hours, although there was still meat in the car, do you happen to know whether or not after having been knocked off that way at night there were day gangs that finished the thing up and



1576

*Nathaniel Tolbert—For Plaintiffs—Rebuttal—Cross.*

got the ship going on her way the next day? A. No, we have been called back that next night. We went in and worked that next night.

The Court: Did you begin just where you left off the night before?

The Witness: No; more work had been going on.

1577

Q. I do not suppose you could tell us in any such case how much straight time went into the unloading and reloading of the ship, how much overtime? A. No, I could not tell you.

Q. How many day gangs did they have up at New Haven? A. Five.

Q. And it was only one or twice when they put on one or two gangs at night in order to finish up the ship the next morning? A. They did not put those gangs that were working nights on. The day gangs what was working worked right through the night. They did not put on no extra gangs.

Q. That happened once or twice? A. That happened once or twice.

1578

Q. And when it did happen they took one or two gangs, day gangs, and worked through the night? A. Yes.

By the Court:

Q. When you worked at New Haven you stayed over there? A. I came home every night.

Q. How long did it take you to come back? A. About two hours, or an hour and 45 minutes, but the gang stayed up there.

Q. All your other workers drove back? A. No, the boss and a few of us.

Q. The others stayed up there? A. We drove back every night and up there every morning for the shape.



By Mr. Taylor:

Q. When you worked for Bay Ridge you were always employed at one of the shapes that occurred during the day? A. Employed during the day!

Q. No, no; I mean you were always hired out of the shape. When you worked for Bay Ridge you were picked out of a shape and hired that way? A. What do you mean, when I go to the pier to shape?

Q. That is right. A. Yes, I shape at Bay Ridge.

Q. You never were hired in any other way? A. No, I never was hired no other way.

1580

Q. And the men who were in the same gang that you happened to be working with, also always have been picked out of the shape, just the same as you? A. We was working in that gang and they get hired down to the pier. They get shaped at the pier.

Q. You are telling us that all of the time you were at Bay Ridge all of the fellows that were in the first gang you ever worked with were in the gang with you every other time you ever worked? A. Not every time in that gang, not all the men every time, but some of them. The same hatch boss was there. You cannot keep the same men unless you got regular work for them, because they go from pier to pier looking for work, and there aint no such thing as regular work. You got to look for jobs at other piers, when you don't get it, when you are shaping up at that pier.

1581

Q. The gangs that you had up at New Haven, were they New Haven men or New York men? A. Four of the gangs was from New York that shaped right down to 95, and they had buses taking them up there. They would send buses to take them up there and bring them back when the ship was finished. The majority of the men in the other gang lived in New Haven. They called that the New Haven gang, and four gangs were from down here.



1582

*Nathaniel Tolbert—For Plaintiffs—Rebuttal—Cross.*

Q. What day of the week did you start to work the New York gangs? Did they always start on a Monday?  
 A. We would shape up on a Monday morning.

Q. And go up in a bus? A. And go up in a bus.

Q. And how long would you stay there? A. I stayed up there for three ships. I mean worked on three ships straight.

The Court: One right after the other?

The Witness: One right after the other.

1583

Q. I do not mean you, I mean the gangs. A. Those gangs that go up would work three ships, one right after the other, but the majority of the time we would only have one ship and we would only work from eight to ten days. It would take eight to ten days to finish the ship, depending on the size of the ship.

Q. As soon as the ship was finished, then they would come back to New York? A. That is right.

Q. In New York the work week for Bay Ridge was Monday to Monday, and you were paid that following Friday?  
 A. Yes.

Q. How was it up in the New Haven gang? A. It was not like that all the time we worked up there.

1584

Q. How was it? A. Of course they were paid off on a Thursday sometimes up there. They made the payroll up like that. They did this time those three ships was up there. They paid off different times.

Q. Why was that? A. I don't know.

Q. Wasn't it because the men wanted to be paid on Thursday? A. No, it was not because the men wanted to. The men could not tell the company how to pay them off.

Q. You were not paid on a Monday to Monday week up there? A. We was, after this last contract. After that they paid off up there just like down here.

The Court: Where were you paid, in New Haven or New York?



The Witness: In New Haven.

Q. Which contract do you mean? A. October 1, 1945.

Q. Before that you got paid up there on days other than Fridays? A. That is right.

Q. And are you able to say whether or not in these weeks in which you got a wage and hour adjustment, or did not get it, your pay was figured from Monday to Monday, or whether it was figured on a different work week? A. It was figured on a different work week. Some of the time we was up there, I do not say all the time, at least they paid us different from that.

1586

Mr. Taylor: If your Honor wants to look at the copy of this thing in the case of Mr. Tolbert, you will see on the first page of the large sheets relating to his employment record that, unlike any other records of any of the plaintiffs, you have special dates inserted whenever he worked at New Haven. Do I make myself clear?

The Court: You mean, for instance where it says March 12.

Mr. Taylor: Yes, with respect to work at New Haven, which is noted under the column entitled "Pier No." You always have some dates. You never have dates with respect to any work done elsewhere than at New Haven.

1587

The Court: All right.

Mr. Taylor: And I do not know the answer to it, but I think it is related to that in some way.

The Court: You will be able to analyze that out in your brief.

Mr. Taylor: I think it can be analyzed out, and I think that it is due to the fact that the wages were figured on some other work week up there.

Q. Were you given an allowance for subsistence, to live on, so much for eating, hotel and board, and so forth,



*Colloquy.*

1588

when you went up to New Haven? A. Yes, in your pay you got \$2 a day when we first started to work up there, and later on they raised it to \$2.50. You got that in your envelope.

By the Court:

Q. In addition to your pay? A. In addition to your pay.

Q. Per day? A. Per day.

(Witness excused.)

1589

Mr. Goldwater: I would like to offer, your Honor, a portion of Monthly Labor Review, Volume 57, No. 1, July, 1943, United States Department of Labor, Bureau of Labor Statistics, entitled "Wage and Hour Statistics, Pay Differentials for Night Work under Union Agreements."

The Court: Is there any objection?

Mr. Goldwater: You don't have to read the whole article to state whether you object to it or not.

Mr. Taylor: Having in mind what your Honor has told us so repeatedly about the extent of your investigations in trying to decide this case, I think I know what would happen to my objection.

1590

The Court: Oh, if you mean would I read the article and then sustain the objection, the answer is yes. I would probably read the article, anyway. It might make a difference whether it is in evidence or whether it is purely background material.

Mr. Taylor: The only reason I was taking time to read it is because without so doing I could not tell whether I might want to try to put in anything in reply.

Well, I will object.

The Court: Objection sustained.

Mr. Goldwater: If your Honor please, I would like to press the offer.

The Court: First you have to sustain its competence,



and I assume that the objection embraces the objection of competence.

Mr. Goldwater: Well is there any question that this is a true copy, Mr. Taylor?

The Court: Of what? A. Of an article somebody wrote:

Mr. Goldwater: This is an official issue of the United States Department of Labor.

The Court: Yes, I know the Monthly Labor Review. It is nothing more than a journal, published by the Bureau of Labor Statistics. It falls in the same class as the National City Bank monthly review, or the Harvard Law Review, or the New York Law Journal.

1592

Mr. Goldwater: I think that your Honor, if I may say so, is mistaken.

The Court: It contains certain statistical tables as well. It also contains articles. I don't know which part you are showing him. But I have read the Monthly Labor Review for many years. Mind you, I am quite prepared to read it as I would an article in one of the law journals.

Mr. Goldwater. I understand; but I am cognizant of the fact that your Honor pointed out that there is a vast difference between your Honor reading it and something being admitted in evidence.

1593

The Court: That is correct.

Mr. Goldwater: That is why I press my offer. I say this is an official record, and that an official record may be evidenced by an official publication thereof. Now if the only question here is whether or not a photostatic copy—

The Court: What is this? Is this statistics or an article written by somebody?

Mr. Goldwater: It is both; it is a combination. There is comment and there are statistics.

Mr. Taylor: It is entitled, if your Honor please, "Pay Differentials for Night Work under Union Agreements."



1594

*Colloquy.*

There is a footnote that says, "Prepared in the Bureau's Industrial Relations Division by Constance Williams."

Mr. Goldwater: That is right.

Mr. Taylor: She is alive and available if you want to call her.

Mr. Goldwater: It must be prepared by somebody.

The Court: I treat that the same as I would an article in the Harvard Law Review by a smart fellow, and it is persuasive or not depending upon its inherent persuasiveness. But it is hardly evidence.

1595

Mr. Goldwater: The objection which is now made in Mr. Taylor's argument against its admission is not on the basis of its competence as evidence, he is not objecting to it as incompetent, that is, in the sense that this is not a true copy of an official record, if this is an official record. If he is making an objection that I am handing him a photostatic copy and not a copy issued by the department itself, then I will get a copy issued by the department itself.

The Court: I am sure that is not the basis of the objection.

1596

Mr. Taylor: Not at all; except, of course, I don't know whether it is all of the article. It ends with Table I. There may be Tables II, III, IV and V, and all sorts of additional textual matter. All I have is the photostatic sheet.

Mr. Goldwater: That is right.

The Court: It seems to me the objection is to the question as to whether it is evidence of anything. What is it evidence of?

Mr. Goldwater: If the objection was on that ground and your Honor sustains it on that ground—

Mr. Taylor: It is on any ground.

Mr. Goldwater: —I am quite content to make my offer and have it marked for identification. I am trying to clear up that that is the ground for objection, and not the fact—

The Court: That it is a photostat?



Mr. Goldwater: That it is a photostat and not in the original form.

The Court: I assume also that Mr. Taylor waives any formality of exemplification and certification, and so on.

Mr. Taylor: Yes.

The Court: If there be any such requirement.

Mr. Taylor: Yes, sir. I do not question but what this is an accurate photostat of some existing pages in some existing publication.

The Court: Of an article published in the Monthly Labor Review by Miss Constance—what?

Mr. Taylor: Williams.

Mr. Goldwater: Not published by her. It is an article issued by her.

The Court: By the Bureau of Labor Statistics, prepared by Miss Constance Williams.

Mr. Goldwater: That is correct. I would like it marked for identification.

The Court: Have it marked for identification.

(Marked Plaintiffs' Exhibit 15 for identification.)

Mr. Goldwater: I would like to offer now a bulletin of the United States Labor Statistics, No. 550, entitled "Cargo Handling and Longshoremen Labor Conditions," of February, 1932.

Mr. Taylor: I object.

Mr. Goldwater: This again is a photostatic copy, your Honor, the same as the last exhibit offered.

Mr. Taylor: I object on the ground that it is incompetent.

The Court: The same objection; it is of the same character?

Mr. Taylor: Yes, sir.

Mr. Goldwater: Yes, sir.

The Court: Then I will treat it in exactly the same way, to which I understand you have no objection.



1600

*Colloquy.*

Mr. Goldwater: I assume that your Honor recognizes that this exhibit, and the previous one, appear from the print stamp on it to have been printed in the United States Government Printing Office in Washington.

The Court: Yes, I understand that.

Mr. Goldwater: I would like to have it marked for identification.

The Court: So is the Congressional Record; but it is not yet contended in this court that that constitutes evidence as to its contents.

1601

(Plaintiffs' Exhibit 16 marked for identification.)

Mr. Goldwater: I now offer Volume 37, No. 6, Monthly Labor Review, United States Department of Labor, Bureau of Labor Statistics, issued by the United States Government Printing Office in Washington, in December, 1933, an article entitled "Unemployment Conditions and Unemployment Relief," subtitle, "Longshore Labor Conditions and Port Decasualization."

Mr. Taylor: The same objection.

The Court: The same disposition. Mark it for identification.

1602

(Marked Plaintiffs' Exhibit 17 for identification.)

The Court: If you will make copies of these available to me I will be glad to read them.

Mr. Goldwater: I will be very glad to, sir.

Mr. Taylor: Let me hand up my "Insolvency Study" then; may I?

The Court: Of course.

Mr. Taylor: I call it an "Insolvency Study" (handing to Court).

Mr. Goldwater: I would like to offer now a letter addressed by L. Metcalfe Walling, Administrator of the



Wage and Hour Division, Department of Labor, addressed to Vernon Williams, vice-president of the Cleveland Stevedore Company, Cleveland, Ohio, under date of May 14, 1943, which copy of letter was furnished to us at our request, having identified the letter, by Mr. Taylor, and which, therefore I assume he will stipulate is a true copy of the original letter.

Mr. Taylor: There is no question about that.

Mr. Goldwater: I offer this letter in evidence, but would state for the record that the plaintiffs by this offer do not wish it to be understood that there is acquiescence in the opinion of the Administrator contained in the second paragraph in the last of page 2 with respect to the crediting of payment for Sundays or holidays.

1604

The Court: In other words, you are impeaching your witness.

Mr. Goldwater: I am not impeaching him at all. I am offering it in evidence because it is an opinion of the Administrator on this subject, which I think is certainly relevant and material and informative; and at the same time I think I have a perfect right, although I am offering it for that purpose, to disagree with the conclusion and to point out to the Court why in a brief.

The Court: Any objection?

1605

Mr. Taylor: Yes, I have, sir. In addition to the normal objections that it is incompetent, irrelevant and immaterial, I want to make some particular objections; first, that it is not part of rebuttal, it is properly part of the plaintiffs' case. Here we are, at five minutes past 11—

The Court: If you plead surprise I will consider giving you an opportunity to surrebut.

Mr. Taylor: I do not plead surprise in the sense that I don't know about the letter. I furnished it to him, as he has stated. But he is bringing it in at this time in the case, after all the oral witnesses are gone, and he brings it in as rebuttal testimony; it is obviously part



*Colloquy.*

1606

of his direct case. If he wishes to rely upon administrative opinions, why, I think that is part of his direct case.

1607

As a further objection I would like to say that it is not addressed to any of the parties in this case, nor to any stevedoring company in the port of New York or in the Atlantic area covered by the I. L. A. contracts. It is addressed to a stevedoring company out in Cleveland. And if your Honor feels that you should go into it, you should read it, you will see that it refers to various contracts out on the Great Lakes. The contracts are not, so far as I know, offered by Mr. Goldwater along with the letter; there purport to be references in the letter as to what the contracts state. I suggest to you that, with the utmost sincerity, the contracts are not as stated in the letter, and that the whole thing is completely misleading. There is no evidence that any knowledge of it was brought home to the people here in this case or in this court, or affected in any way.

The Court: Has this letter been published by the Administrator as a ruling or interpretation?

Mr. Taylor: No, sir.

Mr. Goldwater: It is a ruling or interpretation, as may be seen on its face.

1608

Mr. Taylor: It was mailed; that is what he means.

The Court: Doesn't the Administrator, the Wage and Hour Administrator, have a formal system of rulings and interpretations?

Mr. Taylor: Certainly.

Mr. Goldwater: Oh, he has a formal system in the sense that he publishes interpretations. He also issues them in letter form where inquiry is asked. And where it pertains to the stevedoring business, as it does in this case, I think your Honor may well take it, because the Supreme Court has frequently said that his opinion is entitled to great weight.

Mr. Taylor: They have not said that.



Mr. Goldwater: Oh yes.

Mr. Taylor: I think I might add as a further observation that in any case it is proper for the Court to decide how far it is going into collateral issues. The significance of the statements in this letter, as helpful or controlling or official in one way or another in our case, cannot be discerned without a full study of the Cleveland and Great Lakes situation and all the contracts out there which are involved.

The Court: Well I will look at it.

Mr. Goldwater: On the question, your Honor, of whether or not this is rebuttal—

1610

The Court: Well let us not spend time on that, because the worst that can happen with respect to that is that your adversary may be entitled to an opportunity to offer additional evidence.

Mr. Goldwater: Well there is a statement or opinion here as to the vagaries of the stevedoring business, which addresses itself specifically to testimony offered by the defendants as to regularity or irregularity.

The Court: Well I suppose everything that you have said, Mr. Taylor, goes to the weight of this instrument. It is an opinion expressed by the Administrator, and to the extent it is relevant I think I am entitled to consider it. I will receive it. As a matter of fact, I don't think it needs to be offered in evidence, but I will receive it. If this were published in one of the regular publications of the Wage and Hour Administrator it would not have to be offered in evidence; it would be material which I could have access to, the same as I can have access to a decision of the United States Supreme Court in any particular case.

1611

Mr. Taylor: Yes; but it has not—

The Court: It has not been published and therefore it has to be qualified. It has been qualified as a general letter.



*Colloquy.*

1612

Mr. Taylor: There is another thing I can't understand, and that is how a party can offer a letter on the ground on which it is offered, that it is an Administrative ruling, and they offer it as to the part that they like and they don't offer it as to the part that they don't like.

The Court: He is offering it as to all of it? He is announcing that he does not agree with it. But it is all in evidence. Objection overruled.

(Marked Plaintiffs' Exhibit 18.)

1613

The Court: You might of course, and I assume you will, call my attention to the fact that all these years have gone by and that the Administrator has taken no action to interfere with the practice which has prevailed.

Mr. Taylor: I am going to do some other things in a moment, now that your Honor has opened up this question at this stage of the case that I did not suppose would happen.

1614

Mr. Goldwater: I offer now a letter dated August 17, 1945, written by William R. McComb, Deputy Administrator, Wage and Hour Division, United States Department of Labor, addressed to Mr. H. K. Swenerton, Wage and Hour Salary Administrator, Consolidated Vultee Aircraft Corporation.

Mr. Taylor: May I see it?

The Court: Is there any objection?

Mr. Taylor: Yes, your Honor.

The Court: The same ground?

Mr. Taylor: Yes.

The Court: The same issue?

Mr. Taylor: Yes, your Honor.

The Court: The same disposition.

Mr. Taylor: I might add, seeing that your Honor has not seen this and I only this moment glanced at it, that this is not in our industry. It relates apparently to air



## Colloquy.

1615

craft out in San Diego, California, under a shift system.

The Court: He is in effect offering citations, and he is offering them in evidence.

(Marked Plaintiffs' Exhibit 19.)

Mr. Goldwater: Plaintiffs rest.

Mr. Taylor: May it please the Court, I wish to offer notarized copies of contracts out on the Great Lakes which are involved in the first ruling which was offered by Mr. Goldwater.

The Court: Is that all, or is it going to open up any more? 1616

Mr. Taylor: I have some more.

The Court: On the same subject?

Mr. Taylor: Oh yes. I have some really good rulings that I stand by all the way through.

The Court: In other words, he is offering statements of facts that precede the opinion that you have offered in evidence. I will take it.

Mr. Goldwater: What are these?

Mr. Taylor: These are the contracts between the Cleveland Stevedore Company and Local No. 1317 of the I. L. A. referred to in the letter from Mr. Walling to Mr. Vernon Williams, dated May 14, 1943. 1617

Mr. Goldwater: There is no objection on the part of the plaintiffs. We want your Honor to have all of the facts.

(Marked Defendants' Exhibit M.)

Mr. Taylor: I next offer as one exhibit two letters, one from the Industrial Association of San Francisco to Miss Dorothy Williams, Pacific Coast Regional Counsel of the Wage and Hour Division, December 1, 1938.

The Court: Is the Regional Counsel authorized to issue interpretative bulletins?



*Colloquy.*

1618

Mr. Taylor: Yes; they do.

Mr. Goldwater: I am sorry, but our answer would be in the negative, your Honor. We must object on that ground alone.

The Court: Let us hear what else you have.

Mr. Taylor: And the reply of Miss Williams, or the reply of the Regional Director, Mr. Wesley O. Ash, dated December 6, 1938, in reply to the letter addressed to Miss Williams dated December 1, 1938.

The Court: You may now argue, or later argue, as to whether the Regional Counsel—c-o-u-n-s-e-l?

1619

Mr. Taylor: No; Regional Director.

The Court: —has power duly delegated to him to issue opinions.

Mr. Goldwater: I don't know the answer to that.

Mr. Taylor: You will find a lot of them published that way, I mean, in the Wage and Hour reported services of one sort or another you will find letters printed. Unfortunately, this one does not happen to be printed.

The Court: Subject to your proving the proposition that that person has authority—

Mr. Goldwater: Where is the burden here?

1620

The Court: The burden is upon the offeror of that evidence.

Mr. Goldwater: The objection is noted on the ground that there is no authority in the person who purports to issue this letter to issue opinions.

The Court: You don't mean that person. You mean the Regional Director. You are not questioning that he is Regional Director.

Mr. Goldwater: I mean, not the title of the person; that he has authority to issue opinions.

The Court: I will receive it, subject to his demonstrating in his brief whether he has such authority. Exhibit N received, subject—



Mr. Goldwater: May I see the exhibit first?

I object on the further specific ground, your Honor, that there is nothing in either of the two letters mentioned which would indicate that the purported opinion, if authoritatively issued, has any reference to the stevedoring business or longshore employment.

The Court: That would go to its weight. I suppose if it were an opinion which covered the situation generally I would still be entitled to consider it. It is an interpretation of the Wage-Hour Act in some aspect.

Mr. Goldwater: It is undoubtedly that. By somebody.

1622

The Court: And Mr. Taylor thinks that it has bearing. That is what it amounts to.

Mr. Goldwater: That is right.

Mr. Taylor: When you started this, you sort of opened the gate. I did not start it, Mr. Goldwater started it.

Mr. Goldwater: Yes; but what I had offered had definite reference to the longshore business and longshore employment.

The Court: I am now applying the rule commended upon me by the Circuit Court. Take it in; the damage from taking it in is always less than that from keeping it out.

Mr. Goldwater: All right. I have noted my objection.

1623

The Court: It is received, subject to showing me of course in your brief that there is authority in that person to issue interpretations and opinions.

(Marked Defendants' Exhibit N.)

Mr. Taylor: I now offer a letter dated December 21, 1945, addressed to Mr. Claude W. Brown, vice-president of Marine Clerk Association, Local 63, in Long Beach, California, relating to the computation of wages under the Act, under an agreement very similar to ours, having different rates of pay, \$1.20 rate and \$1.30 rate, with



*Colloquy.*

1624

overtime in each instance, time and a half of the straight time rate, and also containing an answer to the question as to what happens when a man has worked more than 40 night hours at the contract overtime rate.

The Court: Who is the author of the letter?

Mr. Taylor: This one is signed by W. R. McComb, Deputy Administrator.

The Court: All right. Same disposition.

1625

Mr. Goldwater: Your Honor, the objection there is that this has no relevance, because the Administrator says that since there are several open matters involving long-shoremen employees and government contracts he deems it inadvisable to answer the question at this time.

The Court: I should think you would want it in.

Mr. Goldwater: It is burdening the record, and it is a sheet of paper which means nothing.

The Court: It means that the Bureau has reserved opinion on it.

Mr. Goldwater: It certainly gives no advice to the Court, and no assistance.

The Court: He is advising about the fact that the Administrator has not taken a position.

1626

Mr. Goldwater: All right, if your Honor feels that it is advisory I have no objection to your having it.

The Court: All right.

(Marked Defendants' Exhibit O.)

Mr. Taylor: I doubt if this need be marked as an exhibit. I would like to hand you a copy of the printed Interpretive Bulletin No. 4, published by the Administrator of the Wage and Hour Division, and the two press releases No. 1913 and B-1913A which deal with the so-called alternative method of computation.

The Court: I will take them. You don't have to mark them.



Mr. Taylor: I think that is all, sir.

Mr. Goldwater has very graciously stipulated with respect to the letter which I offered addressed to Miss Dorothy Williams and a copy of her reply, that Mr. Lyon, the president of the New York Shipping Association, would testify if called that he received, within a short time after they were written, a copy of each of those letters.

The Court: I am glad to have the stipulation.

All right, both sides rest. We have fixed a time for briefs.

(Conference at the bench between Court and counsel.)



1630

**Plaintiffs' Exhibit 5.**

IN THE  
**DISTRICT COURT OF THE UNITED STATES,**  
**FOR THE SOUTHERN DISTRICT OF NEW YORK.**

Civil Action No. 33-212.

1631

LEO BLUE, et ali.,

Plaintiffs,

v.

HUBON STEVEDORING CORP.,

Defendant.

**STIPULATION TO SEVER THE ACTIONS OF CERTAIN SELECTED  
 PLAINTIFFS**

It is hereby stipulated by the parties, through their undersigned attorneys of record, subject to the approval of this Court:

1632

(1) That the actions of the following named plaintiffs,  
 viz.

Leo Blue  
 Nathaniel Dixon  
 Christan Elliott  
 Tony Fleetwood  
 James Fuller  
 Joseph J. Johnson  
 Sherman McGee  
 Joseph Short  
 Whitfield Toppin  
 Alonzo Steele



*Plaintiffs' Exhibit 5.*

1633

are hereby severed, for the purpose of immediate trial, from the actions of the other plaintiffs named in the caption of the complaint;

(2) That the actions of the other plaintiffs named in the caption of the complaint shall remain pending in the files and upon the docket of this Court until final disposition of the severed actions in this Court and in any court to which they may be carried on appeal or upon certiorari, and until the final disposition of said severed actions pursuant to the mandates of such higher courts;

1634

(3) That this severance shall not prejudice in any way the rights or actions of any of the remaining plaintiffs named in the caption of the complaint, nor the rights or defenses of the defendant, nor have any effect except as stated in the next paragraph.

(4) That the legal rules and principles established by such final disposition of the severed actions shall apply in the actions of the remaining plaintiffs named in the caption of the complaint with respect to such issues in the remaining actions as fall within the legal rules and principles so established;

1635

(5) Notwithstanding the severance and immediate trial of the severed actions of the plaintiffs named above, jurisdiction of the actions of the remaining plaintiffs named in the caption of the complaint shall continue in the trial court subject to direction of the trial judge;

(6) Determination of a reasonable attorney's fee, if the plaintiffs named above ultimately recover, shall be left to the trial judge after ultimate disposition of both the severed actions and the remaining actions;



1636

*Plaintiffs' Exhibit 5.*

(7) The severance provided for by this stipulation shall not be made, in and of itself, the basis of an objection by either party to the admission of evidence otherwise relevant.

June 17, 1946  
(Date)

GOLDWATER & FLYNN and  
MAX R. SIMON,

by MONROE GOLDWATER,  
Attorneys for Plaintiffs.

1637 June 17, 1946  
(Date)

JOHN F. X. McGOHEY,  
United States Attorney.

By MARVIN C. TAYLOR,  
Attorneys for Defendant.

Approved:

SIMON H. RIFKIND,  
U. S.-D. J.

1638



**Plaintiffs' Exhibit 6.**

IN THE  
DISTRICT COURT OF THE UNITED STATES,  
FOR THE SOUTHERN DISTRICT OF NEW YORK.  
Civil Action No. 33-213.

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JAMES AARON, et ali.,

Plaintiffs, 1640

v.

BAY RIDGE OPERATING CO., INC.,

Defendant.

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**STIPULATION TO SEVER THE ACTIONS OF CERTAIN SELECTED  
PLAINTIFFS**

It is hereby stipulated by the parties, through their undersigned attorneys of record, subject to the approval of this Court:

(1) That the actions of the following named plaintiffs,  
viz. 1641

James Aaron  
Albert Alston  
James Brooks  
Louis Carrington  
James Hendrix  
Austin Johnson  
Albert Green  
Carl Roper  
Mars Stephens  
Nathaniel Tolbert



*Plaintiffs' Exhibit 6.*

1642

to the extent of that portion of their claims arising out of their employment by the defendant during the year 1944; are hereby severed, for the purpose of immediate trial, from the claims of these plaintiffs arising out of their employment before or after 1944, and from the actions of the other plaintiffs named in the caption of the complaint.

1643

(2) That the actions of the plaintiffs named in paragraph (1) above arising out of their employment before or after 1944, and the actions of the other plaintiffs named in the caption of the complaint, shall remain pending in the files and upon the docket of this Court until final disposition of the severed actions in this Court and in any court to which they may be carried by appeal or upon certiorari, and until final disposition of said severed actions pursuant to the mandates of such higher courts.

1644

(3) That this severance shall not prejudice in any way the rights or the actions of the plaintiffs named in paragraph (1) above arising out of their employment before or after 1944, nor the actions of any of the other plaintiffs named in the caption of the complaint, nor the rights or defenses of the defendants, nor have any effect except as stated in the next paragraph.

(4) That the legal rules and principles established by such final disposition of the severed actions shall apply in the actions of the plaintiffs named in paragraph (1) above growing out of their employment by the defendant before or after 1944, and in the actions of the remaining plaintiffs named in the caption of the complaint, with respect to such issues in the remaining actions as fall within the legal rules and principles so established.

(5) Notwithstanding the severance and immediate trial of the severed actions of the plaintiffs named above, jur-



*Plaintiffs' Exhibit 6.*

1645

isdiction of the actions of the remaining plaintiffs named in the caption of the complaint, and of the actions of plaintiffs named in paragraph (1) above growing out of their employment by the defendant before or after 1944, shall continue in the trial court subject to direction of the trial judge;

(6) Determination of a reasonable attorney's fee, if the plaintiffs named above ultimately recover, shall be left to the trial judge after ultimate disposition of both the severed actions and the remaining actions;

1646

(7) The severance provided for by this stipulation shall not be made, in and of itself, the basis of an objection by either party to the admission of evidence otherwise relevant.

June 17, 1946  
- (Date)

GOLDWATER & FLYNN and  
MAX R. SIMON,

by MONROE GOLDWATER,  
Attorneys for Plaintiffs.

June 17, 1946  
(Date)

JOHN F. X. MCGOHEY,  
United States Attorney. 1647

By MARVIN C. TAYLOR,  
Attorneys for Defendant.

Approved:

SIMON H. RIFKIND,  
U. S. D. J.



1648

**Plaintiffs' Exhibit 7.**

IN THE  
DISTRICT COURT OF THE UNITED STATES,  
FOR THE SOUTHERN DISTRICT OF NEW YORK.

Civil Action No. 33-212.

LEO BLUE, et ali.,

1649

Plaintiffs,

v.

HUBON STEVEDORING CORP.,

Defendant.

STIPULATION AS TO THE EMPLOYMENT AND PAYMENT OF THE  
SELECTED PLAINTIFFS.

It is hereby stipulated by the parties, through their undersigned attorneys of record, subject to the approval of this Court:

1650

The attached pages may be received as evidence of the facts therein stated, with respect to which the following explanations are made:

(A) These pages are not copies of original records of the defendant. They were specially prepared for the purpose of presenting to the Court in concise form the material facts which are recorded thereon as to the employment and payment of the plaintiffs. The facts recorded on these pages are accurate statements of information appearing on the defendant's original records.

(B) There is one group of pages relating to each plaintiff, which show the following facts with reference to his employment and payment.



*Plaintiffs' Exhibit 7.*

1651

(1) There are two lines for each workweek during which the plaintiff did any work for the defendant during the period covered by the complaint. The workweeks began and ended at 8 A. M. Wednesday until the week beginning July 5, 1943, at and after which the workweeks began and ended at 8 A. M. Monday. The timekeeper's day runs from 8 A. M. to 8 A. M. Thus, under the heading "Monday", for example, the entries cover the hours worked between 8 A. M. Monday and 8 A. M. Tuesday.

(2) On the lines bearing the symbol "A" are entered the total number of hours worked in that workweek between 8 A. M. and 12 noon and 1 P. M. and 5 P. M., Monday to Friday, inclusive, and 8 A. M. and 12 noon on Saturdays, except when any of these days is a holiday, and with the further exception that if the plaintiff had already, in the same workweek worked 40 hours between 8 A. M. and 12 noon and 1 P. M. and 5 P. M., Monday to Friday, inclusive (none of such days being a holiday), all his Saturday morning work is entered on the line bearing the symbol "B."

1652

(3) On the lines bearing the symbol "B" are entered the total number of hours worked by the plaintiff each day and not entered on the line bearing the symbol "A."

1653

(4) Where no rate of pay follows the entry of the number of hours worked, the plaintiff was working as a longshoreman handling general cargo at the rate of \$1.25 per hour, if on line A, or \$1.87½ per hour, if on line B. If he worked on other types of cargo, such as ballast or cement for example, or if



*Plaintiffs' Exhibit 7.*

1654

he was a longshoreman temporarily assigned as a "Header", or "Gangwayman" or "Assistant Foreman" to part of the work requiring more than usual skill, the rate of pay actually paid him for such work is entered after the number of hours shown for that work that day. There is a separate entry for each kind of cargo and position, if the plaintiff worked in more than one position or on more than one type of cargo.

1655

- (5) The total hours shown on the lines A and B, respectively, are entered in the column captioned "Total Hours" and the sum of the figures for each week so entered is the total of all hours worked in that week including all positions and all cargoes.

- (6) Under the caption "Wages" appears the total sum of all items of pay for that week after computation by extension of the hours and rates recorded for that week.

1656

- (7) Wherever it appears in the attached pages that a plaintiff worked eleven hours on a Sunday, those hours were worked between 7 P. M. Sunday and 8 A. M. Monday; wherever it appears that a plaintiff worked eleven hours on a Saturday, those hours were worked between 7 P. M. Saturday and 8 A. M. Sunday; wherever it appears that a plaintiff worked eleven hours on any holiday, those hours were worked between 7 P. M. on the particular holiday and 8 A. M. the following day.

The foregoing provisions shall be deemed limited in the case of the Plaintiff Tony Fleetwood to the following extent:

On August 15, 1943 Tony Fleetwood worked from 8 A. M. to 12 noon, and from 1 P. M. to 8 P. M.,



*Plaintiffs' Exhibit 7.*

1657

making up the eleven (11) hours worked by him in  
that particular day.

June 17, 1946  
(Date)

GOLDWATER & FLYNN and  
MAX R. SIMON,

by MONROE GOLDWATER,  
Attorneys for Plaintiffs.

June 17, 1946  
(Date)

JOHN F. X. MCGOHEY,  
United States Attorney.

By MARVIN C. TAYLOR,  
Attorneys for Defendant.

1658

Approved:

SIMON H. RIFKIND,  
U. S. D. J.

Records omitted.

(One copy of attached records to be handed up pursuant to stipulation.)

1659



1660

**Plaintiffs' Exhibit 8.**

IN THE

**DISTRICT COURT OF THE UNITED STATES,****FOR THE SOUTHERN DISTRICT OF NEW YORK.****Civil Action No. 33-213.****JAMES AARON, et al.,****Plaintiffs,****v.****BAY RIDGE OPERATING Co., INC.,****Defendant.**

1661

**STIPULATION AS TO THE EMPLOYMENT AND PAYMENT OF THE  
SELECTED PLAINTIFFS**

It is hereby stipulated by the parties, through their undersigned attorneys of record, subject to the approval of this Court.

The attached pages numbered 1 to 25, both inclusive, may be received as evidence of the facts therein stated, with respect to which the following explanations are made, viz:

1662

(A) These pages are not copies of original records of the defendant. They were specially prepared for the purpose of presenting to the Court in concise form, the material facts which are recorded thereon as to the employment and payment of the plaintiffs. The facts recorded on these pages are accurate statements of information appearing on the defendant's original records.

(B) In the group of sheets numbered 1 to 15, inclusive, those bearing the name of each plaintiff record the following facts with reference to his employment and payment during every week in which he worked for the defendant during 1944.



*Plaintiffs' Exhibit 8.*

1663

- (1) Under the caption "Week Ended", appears the date of the last day of every workweek in which he worked for the defendant in 1944. The workweek began and ended at 8 A. M. on Mondays.
- (2) Under the caption "Pier No.", appears the number of the pier or piers at which he worked that week.
- (3) Under the caption "Check No.", appears the number of the "brass check" which was given to him at the time of his first work in any given workweek and was surrendered by him for his pay envelope on the payday (Friday) following the end of the workweek.
- (4) Under the caption "Occupation Symbol", appear various symbols to indicate the plaintiff's position and the kind of cargo on which he was working. Where a plaintiff worked in more than one position in any workweek a line is taken for each position, with its appropriate designating symbol. The symbols appearing on these sheets are as follows:

1664

Symbol	Position	Cargo
L	Longshoreman	General
L-B	"	Bulk; Coal
L-CT	"	Cement
L-R	"	Refrigerator
L-DMG	"	Damaged
H*	Headers	General
H-B	"	Bulk, Coal
H-R	"	Refrigerator
AF*	Asst. Foreman	General
AFR	"	Refrigerator
P	Painter	---
TT	Travel Time	---

1665

\*Headers and Assistant Foremen are longshoremen temporarily assigned to parts of the work requiring more than usual skill.



1666

*Plaintiffs' Exhibit 8.*

(5) Under the caption "A" is stated the total number of hours worked that workweek between 8 A. M. and 12 noon and 1 P. M. and 5 P. M., Monday to Friday, inclusive, and 8 A. M. to 12 noon on Saturday, except when any of these days is a holiday. A separate line is taken for each kind of cargo and position, if the plaintiff worked in more than one position or on more than one kind of cargo; and this is indicated by the entry of the appropriate symbol on the same line.

1667

(6) Under the caption "Hourly Rate-A" are stated the rates of pay actually paid for the position and type of cargo indicated in column "A" by the symbol on the same line.

(7) Under the caption "Total Pay for Work in Column A", appears the extension of the pay actually paid on the basis of the entries in the two preceding columns, and also an entry of the amount actually paid as a "Wage & Hour Adjustment", described in paragraph D below, whenever such adjustment was made by the defendant.

1668

(8) Under the caption "B" there is recorded the number of hours worked in each workweek during hours not entered in column A. The position and the cargo are indicated by the symbol on the same line.

(9) In the next column, captioned "Hourly Rate-B" are stated the rates of pay actually paid for the position and type of cargo indicated in column "B" by the symbol on the same line.

(10) The next column, captioned "Total Pay For Work in Column B" contains the extension of the pay actually paid on the basis of the entries in the two preceding columns.



*Plaintiffs' Exhibit 8.*

1669

- (11) In the next column, captioned "Total Hours" appears the total of all hours worked in that week, including all positions and all cargoes.
- (12) Under the caption "Total Pay" appears the sum of all items of pay entered for that week in the columns "Total Pay For Work in Column A" and "Total Pay For Work in Column B."
- (13) The final column notes the amount of "Total Hours" in excess of 40 in that workweek.
- (14) The detailed information called for in the columns described in the preceding paragraphs B(1) to B(10), inclusive, is given only for those workweeks in which "Total Hours" were more than 40. With respect to weeks in which the plaintiff worked not more than 40 hours, the sheets record only the closing dates of such weeks, the place of work, his brass check number of the week, and the total hours worked in the week. 1670

(C) The ten pages hereto attached numbered 16 to 25, inclusive, give certain additional information with respect to the employment and payment of each of the ten plaintiffs whose summarized work records appear on pages 1-15, inclusive, namely, the exact hours of starting and stopping work on each day of the workweek ending April 2, 1944, and the detail of the calculation of pay for that week. The symbols and the rates of pay are explained above. The timekeeper's day runs from 8 A. M. to 8 A. M. Thus, under the heading "Monday", for example, the entries on these pages show the hours worked between 8 A. M. Monday and 8 A. M. Tuesday. 1671

(D) If and only if a plaintiff worked 40 hours between 8 A. M. and 12 Noon and 1 P. M. and 5 P. M. on Mondays



*Plaintiffs' Exhibit 8.*

1672

to Fridays, inclusive, which were not holidays, and then worked between 8 A. M. and 12 Noon on the Saturday of that workweek, he was paid an additional sum, for the work actually performed during those Saturday morning hours. The additional hourly rate paid for work actually performed during those hours was 62½¢ per hour. The additional amount paid for such work was designated by the company on its payroll records "Wage and Hour Adjustment."

1673

(E) The particular plaintiffs, the exact hours of whose starting and stopping of work each day of the workweek ending April 2, 1944 appear on pages 16 to 25 attached to this stipulation, were selected at random and the week of April 2, 1944 was selected at random. The fact that none of the selected plaintiffs in this particular week worked on the Sunday of that week has no particular significance. In other weeks from time to time Sunday was in fact worked not only by the selected plaintiffs but by other plaintiffs.

June 17, 1946

(Date)

GOLDWATER &amp; FLYNN and

MAX R. SIMON,

1674

by MONROE GOLDWATER,  
Attorneys for Plaintiffs.

June 17, 1946

(Date)

JOHN F. X. MCGOHEY,

United States Attorney.

By MARVIN C. TAYLOR,  
Attorneys for Defendant.

Approved:

SIMON H. RIFKIND,  
U. S. D. J.

Records omitted.

(One copy of attached records to be handed up pursuant to stipulation.)



## Plaintiffs' Exhibit 18.

1675

May 14, 1943  
SOL:EG:SMT

Mr. Vernon Williams  
Vice President  
The Cleveland Stevedore Company  
Dock 2, West 9th and Front Streets  
Cleveland, Ohio

Dear Mr. Williams:

This is with reference to your request for an opinion as to whether the provisions of the two ~~contracts~~ between your firm and Local 1317 of the International Longshoremen's Association meet the requirements of the Fair Labor Standards Act. Copies of the amendments to these contracts have been forwarded to me by the regional office in Cleveland and they will be taken into consideration in this letter.

1676

Both contracts provided that in the event of rain, employees shall not be paid for the first half hour of waiting time but shall be paid the regular rate of pay for all subsequent waiting time. This provision, in my opinion, fails to meet the requirements of the Act. Since the imminence of the resumption of work in this case requires the employee's presence at his place of employment, all time spent waiting for the rain to cease should be considered as working time under the Act, and the employees should receive compensation for time thus spent.

1677

In both contracts submitted, it is provided that any work performed beyond the hours fixed for the regular workday or regular workweek shall be considered as "overtime work" and be compensated for at the rate of one and one-half times the regular rate per hour. The agreements further provide that in the computation of any overtime rate under the Fair Labor Standards Act,



*Plaintiffs' Exhibit 18.*

1678

the regular rate per hour prescribed in that agreement shall be deemed to be the regular rate of pay applicable to the particular employment. The regular workday is described as the hours between 6 a. m. and 6 p. m. daily and the regular workweek from 6 a. m. Monday to 6 p. m. Saturday, excluding any holiday which may fall within the week. As I understand the situation, the employees may be called upon to work any hour of the day or night.

1679

As the vagaries of the stevedoring business may require an employee to work any hour of the day or night, it is my opinion that the hours after 6 p. m. daily are as much the employee's regular hours as the hours between 6 a. m. and 6 p. m. Consequently, the extra compensation paid for hours between 6 p. m. and 6 a. m. is not compensation paid for overtime but simply a higher rate of pay to the employee for working during inconvenient hours.

1680

The Division has taken the position that where an employee during a week performs different types of work which call for different rates of pay, the employer may elect to compute overtime compensation either on the rate applicable for the work performed during the overtime hours or on the average hourly rate. If you should elect to pay overtime compensation on the average hourly rate, compensation paid for the hours between 6 p. m. and 6 a. m. must be averaged with compensation paid for the hours between 6 a. m. and 6 p. m. in order to determine the employee's regular rate of pay for purposes of the Act. It is my opinion, however, that overtime compensation paid for Sunday or holiday work under either system may be credited toward overtime due under the Act.

Crediting of payment for Sundays or holidays is permissible since it appears from your agreement that the compensation for such work is intended to be overtime compensation and it is my view that time worked on Sun-



*Plaintiffs' Exhibit 19.*

1681

day or holidays can be regarded as time outside of the employee's normal working hours. However, your attention is directed to the fact that if the averaging system is used the amount that may be credited against the over-time due under the Act will be the actual difference between the regular rate computed by averaging total straight time compensation and the amount paid for holiday or Sunday work.

In all other respects, the provisions of the contract appear to meet the requirements of the Act.

Very truly yours,

1682

L. METCALFE WALLING  
Administrator

*Plaintiffs' Exhibit 19.*

SOL:AGW:DWH

August 17, 1945

Washington 25, D. C.

Mr. H. K. Swenerton

Wage & Salary Administrator

Consolidated Vultee Aircraft Corp.

San Diego, California

1683

Dear Mr. Swenerton:

This will reply to your letter inquiring whether the method of computing overtime compensation employed by Consolidated Vultee Aircraft Corporation meets the overtime requirements of the Fair Labor Standards Act.

You state that the company's first and second shifts are 8 hours a day and the third shift is 6½ hours a day. You state further that third-shift employees are paid 8 hours' pay at second-shift rates for 6½ hours of work. Work in excess of 6½ hours on the third shift or 8 hours on the



*Plaintiffs' Exhibit 19.*

1684

second shift is paid for at time and one-half the established rate for the second shift. Similarly, work in excess of 8 hours on the first shift is compensated at the rate of time and one-half the established first-shift rate.

Your letter also sets out the following example of how an employee's hourly earnings vary as between the three shifts.

	Shift	Reg. No. of Working Hours	Rate of Pay Per Hour
	1	8	\$1.00
1685	2	8	\$1.00 plus \$.08 = \$1.08
	3	6½	8x (1.00 plus \$.08) + 6.5 = \$1.33

You state that it is your view that \$1.33 is the proper rate to use in computing overtime compensation of the third-shift employees under the Fair Labor Standards Act and that amounts paid in excess of this sum to such employees for work in excess of 6½ hours may be credited against overtime due under the Fair Labor Standards Act for work performed in excess of 40 hours a week whether they work only occasionally or whether they work regularly in excess of 6½ hours a day.

1686 Paragraph 69 of Interpretative Bulletin No. 4, a copy of which is enclosed, states:

"Extra compensation paid for overtime work, even if required to be paid by a union agreement or other agreement between the employer and his employees need not be included in determining the employee's regular hourly rate of pay (see par. 13 of this bulletin). Furthermore, in determining whether he has met the overtime requirements of section 7 the employer may properly consider as overtime compensation paid by him for the purpose of satisfying these requirements, only the extra amount of compensation—over and above straight time—paid by him as



*Plaintiffs' Exhibit 19.*

1687

compensation for overtime work—that is, for hours worked outside the normal or regular working hours—regardless of whether he is required to pay such compensation by a union or other agreement. In no week, of course, will the overtime requirements of section 7 be met unless the employee receives an amount equal to at least his regular rate of pay for 40 hours and time and one-half such rate for the hours worked in excess of 40.”

It should be noted that this quotation stresses the point that daily overtime compensation must be paid for work in addition to the employees' regular schedule, if it is to be credited against overtime required by the Fair Labor Standards Act. In this connection, see also subparagraphs (3) and (4) of paragraph 70 of the bulletin.

1688

In *Walling v. Helmerich & Payne*, 323 U. S. 37, the Supreme Court in discussing the question of daily overtime compensation said (on pages 40, 41):

“The split-day plan, moreover, violated the basic rules for computing correctly the actual regular rate contemplated by section 7 (a). While the words ‘regular rate’ are not defined in the act, they obviously mean the hourly rate actually paid for the normal, non-overtime workweek. *Overnight Motor Co. v. Missel*, *supra*.

1689

“But respondent's plan made no effort to base the regular rate upon the wages actually received or upon the hours actually and regularly spent each week in working. Nor did it attempt to apply the regular rate to the first 40 hours actually and regularly worked. Instead the plan provided for a fictitious regular rate consisting of a figure somewhat lower than the rate actually received. This illusory rate



*Plaintiffs' Exhibit 19.*

1690 was arbitrarily allocated to the first portion of each day's regular labor; the latter portion was designated 'overtime' and called for compensation at a rate one and one-half times the fictitious regular rate.

• • • Hence he was entitled to no additional remuneration for work in excess of 40 hours except in the unlikely situation, which never in fact occurred, of his actually working more than 80 hours. The vice of respondent's plan lay in the fact that the contract regular rate did not represent the rate which was actually paid for ordinary, nonovertime hours, nor did it allow extra compensation to be paid for true overtime hours. • • •

1691 I am unable to agree with your view that an employee who regularly works 8 hours a day (or some other number in excess of  $6\frac{1}{2}$ ) receives overtime compensation which is creditable against overtime due under the Fair Labor Standards Act, if he is paid extra compensation for the work in excess of  $6\frac{1}{2}$  hours which he regularly performs merely because he reports to work at the same time as employees who either never or only occasionally work in excess of  $6\frac{1}{2}$  hours a day. In other words, the question of whether particular compensation is for hours in excess of the regular or normal hours of work or is the normal non-overtime workweek should be answered on the basis of the individual employee's hours of work rather than those of the shift to which he is deemed to be attached.

1692 To determine the regular rate of pay at which an employee is employed in a situation such as you present, all compensation, except true overtime compensation received by the employee, should be divided by the number of non-overtime hours worked. Extra compensation for work in excess of  $6\frac{1}{2}$  hours a day may be considered as overtime compensation due under the Fair Labor Standards Act only if it is paid as overtime compensation and is



*Plaintiffs' Exhibit 19.*

1693

paid for hours in excess of those normally and regularly worked by that employee. Thus, where an employee is employed on the third shift and regularly works only  $6\frac{1}{2}$  hours for which he receives the same pay as if he had worked 8 hours on the second shift, his regular hourly rate of pay is  $1/6.5 \times 8 \times$  the stated hourly rate of the second shift. However, if an employee regularly works longer hours his regularly hourly rate of pay must be computed by adding together all compensation received for all his non-overtime hours and dividing the resulting sum by the number of hours for which it is compensation. Accordingly, the compensation of an employee employed on the third shift, who is paid in the manner described in the second paragraph of this letter, would be computed as follows, if he regularly works 8 hours, the second-shift rate is \$1.08 and he works six 8-hour days in a particular week:

No. of non-overtime hours for the week during the first $6\frac{1}{2}$ hours a day ....	=	32.5	
No. of non-overtime hours for the week after the first $6\frac{1}{2}$ hours a day .....	=	7.5	
Total non-overtime hours for the week	=	40.	1695
Overtime hours for the week .....	=	8	
Total hours worked in the week .....	=	48	
Pay for hours in excess of $6\frac{1}{2}$ a day ..	=	$1\frac{1}{2} \times 1.08$	
Straight-time compensation			
40 hours (for 32.5 hours' work) x \$1.08 .....	=	\$43.20	
11.25 hours ( $1\frac{1}{2} \times 7.5$ hours' work) x 1.08 .....	=	12.15	
Total Straight-time compensation for 40 hours .....	=	\$55.35	



1696

*Plaintiffs' Exhibit 19.*

Regular rate of pay per hour—\$55.35 ÷

40 ..... = 1.38

Straight-time and overtime compensation for 8 hours—\$1.38 x 1½ x 8 hours = 16.56

Straight-time compensation for 40 hours = 55.35

Total straight-time and overtime compensation for the week ..... = \$71.91

Very truly yours,

1697

Wm. R. McComb  
Deputy Administrator

Enclosure

1698



**Defendants' Exhibit A.**

1699

IN THE  
DISTRICT COURT OF THE UNITED STATES,  
FOR THE SOUTHERN DISTRICT OF NEW YORK.

Civil Action No. 33-212.

Civil Action No. 33-213.

---

LEO BLUE, et al.,

Plaintiffs, 1700

v.

HURON STEVEDORING CORP.,

Defendant.

---

JAMES AARON, et al.,

Plaintiffs,

v.

---

BAY RIDGE OPERATING CO., INC.,

Defendant. 1701

---

**STIPULATION RELATING TO THE NEW YORK COLLECTIVE  
BARGAINING AGREEMENTS.**

It is hereby stipulated by the parties, through their undersigned attorneys of record, subject to paragraph (4) below and subject to the approval of this Court:

- (1) That the 30 agreements hereto attached, and the three awards made in connection with three of the contracts, are correct copies of all the collective bargaining agreements for the Port of Greater New York covering



*Defendants' Exhibit A.*

1702

the period from May 3, 1916 to date, between the International Longshoremen's Association, and the signatory members of the New York Shipping Association, the Deep-water Steamship Lines, and Contracting Stevedores of the Port of Greater New York and vicinity.

1703

(2) That the signatory parties, other than the International Longshoremen's Association, included all members of the New York Shipping Association, and of the Deep-water Steamship Lines, and of the Contracting Stevedores of the Port of Greater New York.

(3) That all plaintiffs during the period covered by this suit were members in good standing of the International Longshoremen's Association.

(4) The plaintiffs reserve all rights to object to the admissibility and materiality of any of the contracts or awards, or facts covered by this stipulation.

June 17, 1946

(Date)

GOLDWATER &amp; FLYNN and

MAX R. SIMON,

1704.

by MONROE GOLDWATER,  
Attorneys for Plaintiffs.

June 17, 1946.

(Date)

JOHN F. X. MCGOHEY,  
United States Attorney.

By MARVIN C. TAYLOR,  
Attorneys for Defendant.

Approved:

SIMON H. RIFKIND,

U. S. D. J.

Agreements omitted.

(One copy of attached agreements to be handed up pursuant to stipulation.)



## Defendants' Exhibit B.

1705

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Civil Action—File No. 33-212.

---

LEO BLUE, et al.,

Plaintiffs,

against

1706

HUBON STEVEDORING CORP.,

Defendant.

---

## STIPULATION RELATIVE TO EXHIBIT 7, PARAGRAPH A.

The following facts are stipulated to be true:

(1) Where rates of pay appear on the lines marked "A" in Exhibit 7 they are, except as to Headers and Assistant Foremen, the same as the rates enumerated as "straight time" rates of pay for longshoremen in the Collective Bargaining Agreement for the Port of Greater New York for the years 1943-1945 for comparable positions and types of cargo handled. When no rates of pay are entered on the lines marked "A" and the rates of pay are as stated in paragraph "B (4)" of Exhibit 7, such rates are, except as to Headers and Assistant Foremen, the same as the rates enumerated as "straight time" rates of pay for longshoremen handling general cargo in the Collective Bargaining Agreement for the Port of Greater New York for the years 1943-1945. The agreement provides that "straight time rate shall be paid for any work performed between 8 a. m. and 12 noon and from 1 p. m. to 5 p. m. Monday to Friday, inclusive, and from 8 a. m. to 12 noon Saturday."

1707



*Defendants' Exhibit B.*

1708

1709

(2) Where rates of pay appear on the lines marked "B" in Exhibit 7 they are, except as to Headers and Assistant Foremen, the same as the rates enumerated as "overtime" rates of pay for longshoremen in the Collective Bargaining Agreement for the Port of Greater New York for the years 1943-1945 for comparable positions and types of cargo handled. When no rates of pay are entered on the lines marked "B" and the rates of pay are as stated in paragraph "B (4)" of Exhibit 7 such rates are, except as to Headers and Assistant Foremen, the same as the rates enumerated as "overtime" rates of pay for longshoremen handling general cargo in the Collective Bargaining Agreement for the Port of Greater New York for the years 1943-1945. The agreement provides that (immediately after the language quoted in the preceding paragraph) "all other time, including meal hours and legal holidays specified herein, shall be considered overtime, and shall be paid for at the overtime rate."

1710

(3) The Collective Bargaining Agreement does not specifically provide rates of pay for Headers and Assistant Foremen. By long established custom in the port, longshoremen, when temporarily so assigned, are paid 5¢ and 15¢ per hour, respectively, more than they would receive if working as longshoremen. By similar custom longshoremen working as painters are paid the same rates as longshoremen working on general cargo. Travel time, by custom, is an hour's pay, at the longshoremen general cargo rate, to certain nearby places; and two hours' pay at the longshoremen general cargo rate to more distant points.

(4) It is specifically understood that the plaintiffs reserve the right to object to the admissibility of the facts set out above on the ground that they are incompetent,



*Defendants' Exhibit B.*

1711

irrelevant and immaterial; and it is further understood that by stipulating as above the plaintiffs have not conceded or admitted that the Collective Bargaining Agreement constituted the contract of their employment or in any way determined the rates which they were entitled to receive.

Dated, New York, N. Y., June 17th, 1946.

GOLDWATER & FLYNN and  
MAX R. SIMON,

1712

by MONROE GOLDWATER,  
Attorneys for Plaintiffs.

JOHN F. X. McGOHEY,  
United States Attorney.

By MARVIN C. TAYLOR,  
Attorneys for Defendant.

1713



1714

**Defendants' Exhibit C.**

IN THE  
DISTRICT COURT OF THE UNITED STATES,  
FOR THE SOUTHERN DISTRICT OF NEW YORK.

Civil Action No. 33-213.

JAMES AARON, et al.,

Plaintiffs,

v.

1715

BAY RIDGE OPERATING CO., INC.,

Defendant.

STIPULATION RELATIVE TO EXHIBIT 8

A. The following facts are stipulated to be true.

1716

(1) The rates of pay appearing in the column in Exhibit 8 captioned "Hourly Rate-A" are, except as to Headers and Assistant Foremen the same as the rates enumerated as "straight time" rates of pay for longshoreman in the collective bargaining agreement for the Port of Greater New York for the year 1944 for comparable positions and types of cargo handled. The agreement provides that, "straight time rate shall be paid for any work performed from 8 a. m. to 12 noon, and from 1 p. m. to 5 p. m., Monday to Friday, inclusive, and from 8 a. m. to 12 noon Saturday."

(2) The rates of pay appearing in the column in Exhibit 8 captioned "Hourly Rate-B" are, except as to Headers and Assistant Foremen, the same as the rates enumerated as "overtime rates" of pay for longshoremen in the collective bargaining agreement for the Port of Greater New York for the year 1944 for comparable positions and types of cargo handled. The agreement provides (immediately



*Defendants' Exhibit C.*

1717

after the language quoted in the preceding paragraph), "All other time, including meal hours and the legal holidays specified herein, shall be considered overtime, and shall be paid for at the overtime rate."

(3) The collective bargaining agreement does not specifically provide rates of pay for Headers and Assistant Foremen. By long established custom in the port, longshoremen, when temporarily so assigned, are paid 5¢ and 15¢ per hour, respectively, more than they would receive if working as longshoremen. By similar custom longshoremen working as painters are paid the same rates as longshoremen working on general cargo. Travel time, by custom, is an hour's pay, at the longshoremen general cargo rate, to certain nearby places; and two hours' pay at the longshoremen general cargo rate to more distant points. 1718

B. It is specifically understood that the plaintiffs reserve the right to object to the admissibility of the facts set out in paragraph A above on the ground that they are incompetent, irrelevant and immaterial; and it is further understood that by stipulating as in paragraph A above the plaintiffs have not conceded or admitted that the collective bargaining agreement constituted the contract of their employment or in any way determined the rates which they were entitled to receive. 1719

June 17, 1946  
(Date)

GOLDWATER & FLYNN and  
MAX R. SIMON,

by MONROE GOLDWATER,  
Attorneys for Plaintiffs.

June 17, 1946  
(Date)

JOHN F. X. MCGOHEY,  
United States Attorney.

By MARVIN C. TAYLOR,  
Attorneys for Defendant.



1720

## 'Defendants' Exhibit N.

COPY

December 1, 1938

Miss Dorothy Williams  
Pacific Coast Regional Counsel  
Wages and Hours Division  
U. S. Department of Labor  
785 Market Street, Room 902  
San Francisco, California

Dear Miss Williams:

1721

A number of basic industries are vitally concerned with the proper interpretation of certain provisions of the Fair Labor Standards Act of 1938.

The Act provides (Sec. 7(a)) that, subject to exceptions, employees subject to the Act shall not be employed for a work week longer than 44 hours unless such employee receives compensation for his employment in excess of 44 hours at a rate of not less than one and one-half times the regular rate at which he is employed.

1722

Many collective bargaining agreements and company practices fix a straight time and also an overtime rate of pay at one and one-half the straight time rate, the former being applicable during specified hours of the day, the latter after the expiration of a maximum number of hours specified or at certain times such as at night or on Sundays or holidays.

It seems plain that an employer, who compensates his employees for certain hours of work during the week at an overtime rate of not less than one and one-half times the prevailing straight time rate, is entitled under the Act to a full 44 hours of work at the prevailing straight time rate of pay exclusive of hours paid for at the overtime rate, and that statutory compensation at the time and one-half rate only applies after 44 hours of work paid



*Defendants' Exhibit N.*

1723

for at the straight time rate prevailing under labor contracts or company practices.

It would seem equally plain, in computing compensation under the Act for employment in excess of 44 hours during the work week, that the regular rate referred to in the Act is that rate which is paid for straight time hours of work prescribed in labor agreements or applied under company practices, and that therefore the statutory compensation prescribed is one and one-half times such straight time rate. In other words, when the overtime rate prevailing is one and one-half times the straight time rate, the term "regular rate" as used in the Act is the straight time rate and not the overtime rate.

1724

Because of the extreme importance of these questions to the industries concerned, it is requested that you advise in writing whether the views expressed above are correct.

Yours very truly,

(Signed) ALBERT E. BOYNTON, President  
INDUSTRIAL ASSOCIATION OF SAN FRANCISCO

1725



*Defendants' Exhibit N.*

1726

C O P Y

December 6, 1938

Industrial Association of San Francisco  
Alexander Building  
San Francisco, California

Attention—Mr. A. E. Boynton

Gentlemen:

1727

This is in reply to your letter of December 1, 1938.

In situations such as the one outlined in your letter, where collective bargaining agreements or company practices have established a straight time hourly rate of pay and also an overtime hourly rate at one and one-half times the straight time rate, the straight time rate is the "regular" rate, within the meaning of section 7 (a) of the Fair Labor Standards Act.

1728

I do not think it is correct to say that the employer is entitled under the Act to a full 44 hours of work at the prevailing straight time rate of pay. The Act confers not a right, but an obligation, upon the employer. It requires him to compensate each of his employees for employment in excess of 44 hours in a workweek at a rate not less than one and one-half times the regular hourly rate of pay. The right of the employer to any specified numbers of hours of work not exceeding 44, at the straight time rate, might, in the case supposed, be governed by his contract with the union.

If the employer, in the case supposed, compensates his employees for all hours of employment in excess of 44 in a workweek at a rate not less than one and one-half times the straight rate, he has met the requirements of section 7 of the Act; and it is of no consequence that the overtime



**Defendants' Exhibit O.**

1729

payment is allocated to particular hours, under the terms of his agreement with the union.

If this letter does not fully answer your question, please let us know.

Very truly yours,

WESLEY O. ASH  
Regional Director

By (Signed) DOROTHY M. WILLIAMS  
Regional Attorney

1730

**Defendants' Exhibit O.**

C O P Y

SOL:AGW:HD

Washington 25, D. C.

December 21, 1945

Mr. Claude W. Brown, Vice President  
Marine Clerks Association Local 63  
2021 Daisy Avenue  
Long Beach 6, California

1731

Dear Mr. Brown:

This will reply to your letter of November 7, 1945, in which you request an opinion on three problems which you present.

1. You state that in the week of October 15, 1945, you worked the hours shown in the following schedule and were paid the amounts shown in it. You ask whether your overtime compensation was correctly computed for the week in question.



## Defendants' Exhibit O.

Day	Hours Worked	Rate	Straight Time pay	Overtime Premium pay
Monday	9	\$1.30	$9 \times \$1.30 = \$11.70$	$\frac{1}{2} \times \$1.30 \times 1 = \$ .65$
Tuesday	10	\$1.30	$10 \times 1.30 = 13.00$	$\frac{1}{2} \times 1.30 \times 2 = 1.30$
Wednesday	9	\$1.30	$9 \times 1.30 = 11.70$	$\frac{1}{2} \times 1.30 \times 1 = .65$
Thursday	8	1.20	$8 \times 1.20 = 9.60$	
Friday	8	1.20	$8 \times 1.20 = 9.60$	
Saturday	8	1.20	$8 \times 1.20 = 9.60$	$\frac{1}{2} \times 1.20 \times 8 = 4.80$
	52		\$65.20	\$7.40

You state that the work performed on Thursday through Saturday was different from that performed Monday through Wednesday. It is your belief that your employer should have computed your regular rate of pay for overtime compensation by dividing the number of hours you worked in the week into the compensation for the week.

Computation would be as follows:

Regular rate .....	$= \$65.20 \div 52 \text{ hours}$	$= \$1.25$
Overtime compensation ..	$= \frac{1}{2} \times \$1.25 \times 12 \text{ hours}$	$= 7.50$
Straight time compensation .....	$=$	65.20
Total compensation..	$=$	\$72.70

There are enclosed copies of releases R-1913 and R-1915 (A) in which the Administrator announced a change in the administrative policy respecting the computation of overtime compensation. Under these releases the method of computation set out in paragraph 14 of Interpretative Bulletin No. 4 to which you refer is still accepted for administrative purposes as compliance with the Fair Labor Standards Act. However, in the case of hourly paid workers performing different types of work calling for different rates of pay, the Administrator also accepts for administrative purposes, as compliance with the overtime



*Defendants' Exhibit O.*

1735

provision of the Act, the payment of one and one-half times the rate applicable to the overtime hours, if the employer has shown an election to pay on that basis.

Under the Fair Labor Standards Act the overtime hours are the hours worked after the fortieth hour of work in the week. In the situation which you present, assuming that the employer has elected to pay overtime compensation on the rate applicable to the overtime hours, the Administrator would require only that the employee be paid \$7.20 as overtime compensation for a total compensation of \$72.40 for the week (the last 12 hours worked are the overtime hours,  $\frac{1}{2} \times \$1.20 \times 12 = \$7.20$ ). Assuming that the premium payments which you designate as overtime compensation are true overtime compensation, they may be credited against overtime compensation due under the Fair Labor Standards Act, and the employer has more than satisfied his obligations under the Act. Paragraphs 69 and 70 of Interpretative Bulletin No. 4 discuss the types of premium payments which may be credited against overtime compensation due under the Act.

1736

2. You ask:

"Suppose I work from a Monday through Friday eight hours per day for one of the member companies and then on Saturday I am dispatched to someone of the other member companies for work and work eight hours on Saturday, making a total of forty-eight hours worked, (this happens often). Am I entitled to overtime pay for the eight hours worked on Saturday?"

1737

Whether you are entitled to overtime pay in this situation would depend upon whether the two employers may be considered to be acting entirely independently of each other with respect to your particular employment. If they are acting independently each employer, in ascer-



*Defendants' Exhibit O.*

1738

taining the extent of his obligations under the Act, may disregard any work you performed for the other. Consequently, if this situation exists in the instance you mention, the Act would not require either employer to pay overtime compensation in the instance you present. On the other hand, if your employment by one employer is not completely disassociated from your employment by the other, the total of the hours worked for the two employers should be considered as a whole for the purposes of the Act. Whether employments by two employers are completely disassociated depends, of course, upon the facts in the particular case. However, a joint employment will not be considered to exist solely because a single collective bargaining agreement covers both employers.

1739

## 3. You also ask:

"Suppose I work over forty hours nights from 5 p. m. to 8 a. m. when our overtime rates apply, see page 9, sec. 1. Am I entitled to time and one-half of the \$1.80 rate applicable to night work, if I work over forty hours in a week?"

1740

In view of the fact that this precise question is being raised in several pending suits involving longshoremen employees and Government contractors, the Division deems it inadvisable to answer this question at this time.

If you have additional questions regarding the Fair Labor Standards Act, I shall be glad to advise you further. You may, however, find it more convenient to consult the branch office of the Wage and Hour and Public Contracts Division at 417 H. W. Hellman Building, Spring and Fourth Streets, Los Angeles 13, California.

Very truly yours,

WM. R. McCOMB  
Deputy Administrator

Enclosures



**Opinion.****UNITED STATES DISTRICT COURT,****SOUTHERN DISTRICT OF NEW YORK.****LEO BLUE, et al.,****Plaintiffs,***against***HURON STEVEDORING CORP.,****Defendant.****Civ. 33-212****1742****JAMES AARON, et al.,****Plaintiffs,***against***BAY RIDGE OPERATING CO., INC.,****Defendant.****Civ. 33-213****APPEARANCES:**

**MAX R. SIMON, Esq., and GOLDWATER & FLYNN, Esqs.,**  
**Attorneys for Plaintiffs; Monroe Goldwater, Esq.,**  
**James L. Goldwater, Esq., Joseph E. O'Grady, Esq.,**  
**of Counsel.**

**1743**

**JOHN F. SONNETT, Esq., Assistant Attorney General;**  
**JOHN F. X. MCGOHEY, Esq., United States Attorney,**  
**Attorneys for Defendant.**

**J. FRANCIS HAYDEN, Esq., Spec. Assistant to the Attorney**  
**General.**

**MARVIN C. TAYLOR, Esq., Attorney, Department of Justice.**

**MARY L. SCHLEIFER, Esq., Labor Law Counsel, War Ship-**  
**ping Admin. of Counsel.**



*Opinion.*

The Fair Labor Standards Act provides:

"7(a) No employer shall \* \* \* employ any of his employees \* \* \* for a work week longer than 40 hours \* \* \* unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed" (29 U. S. C. A. 207).

The collective bargaining agreement between the International Longshoremen's Association and the defendants, which governs the employment practices of the plaintiffs and the defendants herein, provided for two classes of compensation: a "straight time" hourly rate and an "overtime" hourly rate. Paragraph 3 of the agreement, in effect during the period involved in this litigation, provided as follows:

"(a) Straight time rate shall be paid for any work performed from 8 A. M. to 12 Noon and from 1 P. M. to 5 P. M., Monday to Friday inclusive, and from 8 A. M. to 12 Noon Saturday. (b) All other time, including meal hours and the Legal Holidays specified herein, shall be considered overtime and shall be paid for at the overtime rate."

For general cargo, the straight time hourly rate was \$1.25 and the overtime hourly rate was \$1.875.

It is the plaintiffs' contention that the excess of the "overtime" rate over the "straight time" rate represented a shift differential; that \$1.875 per hour constituted the regular rate for the night shift; that when more than 40 hours of work was done in any one week and all such work was performed during the night shift, the overtime rate must be calculated at 150% of \$1.875 and such rate applied to the hours in excess of 40; that in all cases the



compensation should be calculated in one of two ways, the first of which plaintiffs prefer. 1. Total wages paid divided by total hours worked equals regular rate to be applied to 40 hours; and 150% thereof to the hours in excess of 40. 2. Wages payable at contract rates for the first 40 hours of work, divided by 40, equals the regular rate; 150% thereof is the rate to be applied to the hours in excess of 40.

There is a certain plausibility about plaintiffs' case. For instance, in the case of an employee who worked only during the so-called "overtime" hours, it is true that he received compensation at no greater rate for the hours in excess of 40 than for the hours within 40. Such a result seems to fly in the face of the statute.

1748

The defendants' contention is on its face equally plausible. They declare that the "regular rate", which is the statute's measuring rod, has been contractually established by the parties at \$1.25 an hour; that for all hours in excess of 40, defendants have, in accordance with the statutory command, paid \$1.875 an hour; and that in addition, beyond the command of the statute, they have paid \$1.875 an hour for all hours outside of a specified clock-pattern. Having paid more than required by statute, they contend, they have not violated its provisions.

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The I. L. A. is not a party to the litigation. However, Mr. Joseph B. Ryan, its president, testified as a witness for the defendants. He reported that 30,000 members were employed at the Port of New York during the war; that the Union objectives were "to decasualize longshore work as much as possible, to have the work done in the daytime as much as possible, and make it as expensive for the employers as possible on Sunday"; that there has been no strike of longshoremen from 1907 to 1945; and that the Union was opposed to the suit "as it might wipe out all of the gains we had made for our men over a period of 25 years".



*Opinion.*

1750

This controversy requires for its resolution a delicate adjustment to accommodate the harmonious application of three national policies. A heavy handed meshing of these three policies with the industrial machine which fails to minimize the friction at their points of contact can generate enough heat to impair one or more of the policies or severely injure the machine itself.

1751

In chronological order we have (1) the National Labor Relations Act, July 5, 1935, 49 Stat. 499, to encourage the practice of collective bargaining; (2) the Fair Labor Standards Act, June 25, 1938, 52 Stat. 1060, to correct and eliminate the labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well being of workers; (3) the national need during the war for the maximum of production as illustrated by Executive Order 9301, February 9, 1943, 8 Fed. Reg. 1825, establishing the 48 hour week for the duration of the war:

A few simple illustrations make this necessity clear.

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1. A number of industries have, by collective bargaining, established a workweek of less than 40 hours, 36 or 30—although actual work is pursued during 48 hours or longer. In such industries the employees receive "straight time" compensation for the stipulated hours and "time and a half" for all hours in excess thereof. Manifestly they do not receive, for hours in excess of 40, 150% of the average rate paid for the hours within 40. I see nothing in the policy and purposes of F. L. S. A. which forecloses bona fide negotiation between employers and a union for a shorter work week than 40 hours a week. <sup>(1)</sup>

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<sup>1</sup> Presumably a labor contract which established a one-hour week with provision for compensation for "time and a half" for all hours in excess of one hour would fail, as a device to circumvent F.L.S.A.



*Opinion.*

1753

2. A number of industries have developed collectively bargained agreements which have established a work week measured not only by a specified number of hours per week but by a specified number of hours per day—usually, eight hours. Compensation for hours of work in excess of the prescribed daily schedule of eight hours is calculated at 150% of the established rate even if the aggregate of hours for the week does not exceed 40. Assuming a work schedule of five 10-hour days, the employees would receive, under their contract, compensation at overtime rates for 8 hours of the first forty. The rate of pay for hours in excess of forty would be less than 150% of the average rate for the hours within forty. Manifestly the application to such an employment arrangement of either of the formulae suggested by plaintiffs would constitute a deterrent to the negotiation of such employment contracts.

1754

3. Following the promulgation of Executive Order No. 9301, and in many instances before that date, in response to the war-time demand for production, the 48 hour work week became quite general. In the case of newly recruited employees in the war industries, 48 hours measured the "normal" work week throughout the term of their employment. In a sense, the 40 hour week was merely a theoretical fiction as opposed to the "real" fact of a 48 hour week. The logical extension of plaintiffs' argument would require a holding that in paying such employees for the 8 hours of overtime at a rate equal to 150% of the straight time rate, such employers had violated the F. L. S. A.; that the wages payable to such employees must now be recalculated by finding the "regular rate" to consist of the quotient of total weekly wages, divided by 48, and the overtime rate as equal to 150% thereof. Would employers, even in the exigencies of the

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*Opinion.*

1756

war, have so readily yielded to the demands of national policy for a longer work week if they could foresee such an enlarged wage liability?

Whatever the answer to such a rhetorical question, it is clear that the application of either of plaintiffs' formulae to the Nation's wage bill retrospectively would create havoc with established labor relations, put collective bargaining in the category of a device for obtaining money under false pretenses and probably strain the resources of a substantial proportion of American industry.

1757

Such catastrophic results are inevitable once we accept plaintiffs' underlying premise—that in determining the "regular rate" intended by Congress, we must close our eyes to the contract in good faith negotiated between employer and employees and look only to the actual work pattern. Upon such a premise, genuine collective bargaining cannot live.

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If we are free to reject the contractual "regular rate" in the case of longshoremen, there is no rational basis for not rejecting it in the three illustrations. The inevitable consequence of such a rule would be severely to restrict the scope of collective bargaining, to check the development of agreements more favorable to employees than the minimum standards established by F. L. S. A. and to retard the use of overtime even when national interest required it.

Such a dilemma is not a necessary implication of the F. L. S. A. That Act can more easily be read to be in harmony with the N. L. R. A. and a flexible work pattern. The F. L. S. A. does not speak of an average rate; it speaks of a regular rate. Congress has not circumscribed the courts in the selection of a "regular" rate.

The Supreme Court has already given the cue. Collective bargaining agreements, though favored by the law, will not be permitted to do open violence to the policies of the Fair Labor Standards Act.



**Walling v. Harnischfeger Corp., 1945, 325 U. S. 427.**

The converse is likewise true. F. L. S. A. should not lightly override the policy of collective bargaining. F. L. S. A. establishes *minimum* standards. Collective bargaining has freedom to move unhampered above the floor F. L. S. A. establishes.

In *Walling v. Belo Corp.*, 1942, 316 U. S. 624, 631, the court said,

"In its initial stage the question to which this dispute gives rise is a question of law, a question of interpretation of the statutory term 'regular rate.' But it is agreed that as a matter of law employer and employee may establish the 'regular rate' by contract." 1760

The dissenting justices did not challenge this proposition. They said, p. 636,

"The Court's interpretation that, in the absence of bad faith, any form of contract which assures the payment of the minimum wage and the required overtime complies with the Act may be assumed to be correct." 1761

They differed only in their construction of the contract as providing for weekly wages with variable hours.

Analysis of the instant contract reveals a rather unique situation. We are not here concerned with a condition like that confronting the Supreme Court in *Walling v. Helmerich & Payne, Inc.*, 1944, 323 U. S. 37. There a scheme was devised by a mathematical arrangement, unrelated to the facts, to defeat the purposes of F. L. S. A. Here we are dealing with a collectively bargained agreement which is the natural development of a long history.



*Opinion.*

1762

Nor is the problem of this case that which the Supreme Court dealt with in *Walling v. Harnischfeger Corp.*, *supra*, where regular incentive bonuses were unlawfully excluded from the regular rate of compensation.

1763

In both of these cases, and arguably in the *Belo* case, there was a normal work week, and a regular rate of compensation which was capriciously or at least designedly distorted in order to exhibit a mechanical compliance with F. L. S. A. The identifying mark of the case at bar is the absence of any norm, any regularity. Both parties have emphasized the casual, irregular character of the employment. Once you cut loose from the anchor of the agree-

1764

ment, neither employee nor employer would have any means of calculating what rate of compensation has been earned until sometime after the event. Employees working side by side would be earning different rates of compensation. An employee's compensation would vary depending upon whether he worked for one employer or for more than one, in the course of a single week. While none of these considerations is of paramount significance, it cannot be said by a court that they are beyond proper evaluation by a labor union seeking to maintain orderly and peaceful labor relations in a highly casual field of employment. Decasualization, concentration of work during daylight hours, uniformity of compensation and simplicity of calculation are legitimate objectives of a collective labor agreement. None of them is artificially designed to defy the spirit of the F. L. S. A. while embracing its letter. The agreement here under scrutiny was not an artificial rearrangement of pre-F. L. S. A. rates of compensation in order to avoid additional compensation payable under that Act. It is not an attempt "to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purposes";

*Walling v. Helmerich & Payne, Inc.*, *supra*;



*Walling v. Youngerman-Reynolds Hardwood Co.*,  
1945, 325 U. S. 419, 424.

On the contrary it is the product of long history, collective bargaining, and an honest effort, however imperfectly achieved, to deal with the necessities of a unique situation.

Plaintiffs argue that the command of the statute is not satisfied unless at a chronological point, 40 hours after the commencement of work, a rate of 150% of the rate of compensation during the first 40 hours goes into effect. The statute clearly does not speak of premium payments for hours following the first forty, but only for hours in excess of forty. The only support for plaintiff's contention is the language of the court in *Walling v. Youngerman-Reynolds Hardwood Co.*, supra, 423.

1766

"Thus by increasing the employer's labor costs by 50% at the end of the 40-hour week and by giving the employees a 50% premium for all excess hours, §7(a) achieves its dual purpose \* \* \*"

Clearly the court's attention was not addressed to the subtlety which plaintiffs now suggest. Until the Appellate Courts command otherwise I shall not assume that an employment contract which puts the premium rate into effect for all hours in excess of 36, violates the statutory mandate, although no change in rate is effected at the end of 40 hours.

1767

A contract cannot arbitrarily convert a shift differential into an overtime premium. But neither should the circumstance that war time exigencies vastly multiplied the occasions for overtime work convert true overtime premiums into shift differentials.<sup>1</sup>

<sup>1</sup> Of the 20 plaintiffs, only 4 did all their work during contract "overtime" hours; two worked only a very small number of "straight time" hours; four worked more "straight time" hours than "overtime" hours.



*Opinion.*

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Confessedly the line of distinction between the two may at times be difficult to discern. One of the economists identified the ratio of the premium as the only reliable guide. Shift differentials are usually represented by very modest premiums—5¢-15¢ per hour.<sup>2</sup> The economics of the shift differential are that the more intensive use of plant and equipment permits the employer to pay a somewhat higher wage without incurring costs higher than in one shift operation and perhaps even to obtain lower costs. The shift differential is not designed to deter plural shift operation. The 50% overtime premium, as provided by statute and by the labor agreement here, is expressly designed to deter the penalized activity.

On the evidence adduced here it cannot be doubted that the "overtime" premiums established by I. L. A. agreement were designed to curtail, and measurably succeeded in curtailing, excessive and abnormal hours. Even during the peak of the Battle of the Atlantic there was a far greater concentration of work during the regular 44 hour period than during "overtime" hours. The fact that throughout the war stevedores were required to obtain special permission from the War Shipping Administration before they could put longshoremen to work after 5 P. M. throws light upon the deterrent purpose and effect of the penalty payment.

<sup>2</sup> Economic Stabilization Director issued a policy directive, dated March 8, 1945, which placed a definite limitation on the amount of shift differentials which the National War Labor Board might approve or direct for *non-continuous* shift operations. Under this limitation, the differentials could not exceed four cents for the second shift and eight cents for the third shift. This was supplemented by a directive of April 24, 1945, which permitted the N.W.L.B. to approve or direct shift differentials for *continuous* shift operations in amounts not to exceed four cents for the second shift and six cents for the third shift. (C.C.H. Labor Law Service, Vol. 1 A, parags. 10,034.11 and 10,462.)



*Opinion.*

1771

In the instant case, the collectively bargained agreement established a regular rate. True in a few instances the employee never received the regular rate because all of his work fell into the "overtime" period. That is a fortuitous circumstance which does not detract from the regularity of the rate.

I conclude that defendants have not violated the F. L. S. A. except in the following instances:

1. Where a defendant failed to pay a plaintiff who was employed as a header, gangwayman or assistant foreman, receiving therefor additional compensation at the regular rates of 5¢, 5¢ and 15¢ per hour, respectively, one and one-half times such regular rates for hours in excess of 40 during any work week. .

1772

2. Where a defendant failed to pay a plaintiff who was employed as a longshoreman handling the specific types of cargo enumerated in paragraphs 4(b)-(e), inclusive, of the collective agreement, one and one-half times the "straight time hourly rates" set forth in the collective agreement for such types of work for hours worked in excess of 40 during any work week.

3. Where defendant Bay Ridge Operating Co., Inc., failed to pay plaintiffs Alston, Roper and Tolbert at a rate of one and one-half times the "straight time hourly rate" at which said plaintiffs were employed, for hours worked in excess of 40 during any work week, all during "straight time" hours.

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With respect to these specific items additional proof will be received and supplemental findings made.

Dated, New York, N. Y., Jan. 6, 1947.

SIMON H. RIFKIND,  
U. S. D. J.



1774

**Findings of Fact and Conclusions of Law.****UNITED STATES DISTRICT COURT,****SOUTHERN DISTRICT OF NEW YORK**

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**[SAME TITLE]**

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These actions having been tried together to the Court without a jury, the court hereby makes its findings of fact and states its conclusions of law, as follows:

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**FINDINGS OF FACT.**

1. These actions were originally commenced as representative or class actions, brought on behalf of the plaintiffs named therein and "all employees and former employees of defendant similarly situated."

At the commencement of the trial, the parties stipulated that these actions are no longer to be considered as such representative or class actions, but as actions on behalf of the plaintiffs named therein.

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2. At the commencement of the trial the parties stipulated, in the action brought against Huron Stevedoring Corporation, that the actions of the following named plaintiffs:

Leo Blue;  
Nathaniel Dixon;  
Christan Elliott;  
Tony Fleetwood;  
James Fuller;  
Joseph J. Johnson;  
Sherman McGee;  
Joseph Short;  
Alonzo Steele;  
Whitfield Toppin,



*Findings of Fact and Conclusions of Law.*

1777.

be severed, for the purpose of immediate trial, from the actions of the other plaintiffs named in the complaint, and that the legal rules and principles established by the final disposition of the severed actions shall apply in the actions of the remaining plaintiffs named in the complaint.

3. At the commencement of the trial the parties stipulated, in the action brought against the Bay Ridge Operating Co., Inc., that the actions of the following named plaintiffs:

James Aaron;  
 Albert Alston;  
 James Brooks;  
 Louis Carrington;  
 James Hendrix;  
 Austin Johnson;  
 Albert Green;  
 Carl Roper;  
 Mars Stephens;  
 Nathaniel Tolbert,

1778

be severed, for the purpose of immediate trial, from the actions of the other plaintiffs named in the complaint, and that the legal rules and principles established by the final disposition of the severed actions shall apply in the actions of the remaining plaintiffs named in the complaint.

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4. These actions, which have been consolidated for trial, cover employment of ten longshoremen employed by defendant Huron Stevedoring Corp., and of ten longshoremen employed by defendant Bay Ridge Operating Co., respectively, in the loading and unloading of ships in the Port of New York during the period October 1, 1943 to September 30, 1945 (hereinafter referred to as "the period in suit").



1780

*Findings of Fact and Conclusions of Law.*

5. Defendants were engaged, during the period in suit, in the general stevedoring business in the Port of New York in connection with, which they made their contracts with shipowners and operators to load and discharge, at piers and docks cargoes moving in interstate or foreign commerce, by the use of longshoremen employed by defendants.

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6. During the period in suit, the plaintiffs enumerated in Finding No. 2 were employed by defendant Huron Stevedoring Corp., and the plaintiffs enumerated in Finding No. 3 were employed by Bay Ridge Operating Co., Inc., as longshoremen at piers and docks within the Port of New York in loading and discharging cargoes in and off vessels moving in interstate and foreign commerce.

7. The parties have stipulated that during the period in suit, plaintiffs were employees of the defendants respectively, engaged as longshoremen in commerce within the meaning of, and entitled to the benefits of, the Fair Labor Standards Act of 1938.

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8. During the period in suit, there was in effect a collectively bargained agreement entered into between members of the New York Shipping Association and others, including defendants, and the International Longshoremen's Association, of which plaintiffs were members, covering all longshoring in the Port of New York.

9. The Agreement contains the following provisions with respect to the hours of work and scale of wages:

"2(a) The basic working day shall consist of 8 hours, and the basic working week shall consist of 44 hours. Men shall work any night of the week, or on Sundays, Holidays, or Saturday afternoons, when re-



*Findings of Fact and Conclusions of Law.*

178

quired. On Saturday night, work shall be performed only to finish a ship for sailing on Sunday, or to handle mail or baggage.

“(b) Meal hours shall be from 6 a. m. to 7 a. m., from 12 Noon to 1 p. m., from 6 p. m. to 7 p. m., and from 12 Midnight to 1 a. m. . . .

“(c) Legal Holidays shall be: New Year's Day, Lincoln's Birthday, Washington's Birthday, Good Friday on the New Jersey Shore, Decoration Day, Fourth of July, Labor Day, Columbus Day, Election Day, Armistice Day, Thanksgiving, Christmas, and such other National or State Holidays as may be proclaimed by Executive authority. . . .

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“3(a) Straight time rate shall be paid for any work performed from 8 a. m. to 12 Noon and from 1 p. m. to 5 p. m., Monday to Friday, inclusive, and from 8 a. m. to 12 Noon Saturday.

“(b) All other time, including meal hours and the Legal Holidays specified herein, shall be considered overtime and shall be paid for at the overtime rate.

“(c) The full meal hour rate shall be paid if any part of the meal hour is worked and shall continue to apply until the men are relieved.

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“4. Wage Scale: The wage scale shall be as follows:

	<i>Straight</i>	<i>Over-</i>
GENERAL CARGO AGREEMENT	<i>Time</i>	<i>time</i>

“(a) General Cargo of every description including barrel oil when part of General Cargo, and all General Cargo handled in refrigerator space with the temperature above freezing . . . . .	\$1.25	\$1.87½
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1786

*Findings of Fact and Conclusions of Law.*

1787

1788

	Hourly Rate	Hourly Rate
"(b) Bulk Cargo, ballast, and all coal cargoes, including loading and trimming coal for a ship's own bunker purposes .....	\$1.30	\$1.92½
"(c) Cement in bags ....., .....	1.30	\$1.92½
"(d) Wet hides, creosoted poles, creosoted ties, creosoted shingles and soda ash in bags .....	\$1.40	\$2.02½
"(e) Refrigerator space cargo—meats, fowls and other similar cargo— which is to be transported with the temperature in the refrigerator at freezing or lower; these rates shall be paid the full gang .....	\$1.45	\$2.07½
"(f) Kerosene, gasoline and naphtha in cases and barrels, when loaded by case oil gangs, and with a fly .....	\$1.45	\$2.17½
"(g) Explosives .....	\$2.50	\$3.75
(i) When handled down the Bay, the time shall start from the time men leave the pier until the time they return to pier.		
(ii) When handled down the Bay, men shall supply their own meals, but \$1.00 per meal shall be allowed by the employer.		
(iii) When explosives, such as are customarily handled down the Bay are handled at any pier, men shall be paid at the Explosives rate of pay.		



*Findings of Fact and Conclusions of Law.*

1789

Hourly    Hourly  
Rate    Rate

- (iv) Any dispute as to what explosives are, shall be settled by the Bureau of Explosives whose decision shall be final and shall be accepted by both sides.

"(h) Damaged Cargo ..... \$2.50    \$3.75

- (i) All cargo damaged by either fire or water, when such damage causes unusual distress or obnoxious conditions, and, also, in all cases where men are called upon to handle cargo in the ship under distress conditions.

1790

- (ii) The damaged cargo rates shall not be paid when sound cargo in a separate compartment is handled."

1791

10. The words "Straight Time", "Straight Time Hourly Rate", "Overtime" and "Overtime Hourly Rate" will be used herein in the sense defined in the Collective Agreement as set forth in Finding No. 9.

11. In addition to the wage scale provided for in the Collective Agreement, longshoremen, including the plaintiffs, whenever assigned by stevedores, including the defendants, to perform a specified part of the work calling for additional responsibility, were paid, by custom, additional compensation, called heading differentials, as follows:



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5 cents per hour for work as a "header". (A header is a longshoreman who is in charge of a group of men, usually four, working in the hold of the ship);

5 cents per hour for work as a "gangwayman". (A gangwayman is a longshoreman who is in charge of a group of men, usually four, working on deck); and

15 cents per hour for working as an assistant foreman.

These rates of additional payment were not increased when the employee worked in excess of 40 hours or during "overtime" hours.

12. Under the Collective Agreement, the "overtime hourly rate" is one and a half times the "straight time hourly rate", except that in four instances, the "overtime" rate falls slightly short of that amount as set forth in Finding No. 9. Thus, the "straight time hourly rate" for handling cement in bags is \$1.30 per hour, and the "overtime" rate is \$1.92 $\frac{1}{2}$  cents per hour and not \$1.95 per hour; the "straight time" rate for handling bulk cargo ballast, and all coal cargoes is \$1.30 per hour, and the "overtime" rate is \$1.92 $\frac{1}{2}$  cents per hour; the "straight time" rate for handling wet hides, creosoted poles, etc., is \$1.40 per hour, and the "overtime" rate is \$2.02 $\frac{1}{2}$  cents per hour; the "straight time" rate for handling refrigerator space cargo is \$1.45 per hour, and the "overtime" rate is \$2.07 $\frac{1}{2}$  per hour.

13. The work week commenced on Monday at 7 a. m., and ended the following Monday at 7 a. m.

14. In the longshore industry in the Port of New York there are no regular or usual hours of work. Employment is highly casual in character, more so than employment in any other major industry. This condition is primarily the product of the uncertainties of maritime, shipping and weather conditions, the unpredictable char-



acter of ship and overland cargo arrivals and the use of the "shape" as a hiring device, as defined in Finding No. 16. The casual character of the work is reflected both in the difficulty of finding employment, the irregularity of the hours of beginning and stopping work, and in the uncertainty of the duration of employment during any specified period. In these respects the work pattern of longshoremen is unique.

15. During the period in suit, and for many years prior thereto, longshoring in the Port of New York has had the following characteristics. With rare exceptions, longshoremen do not work regularly or continuously for any one stevedoring company, but shift from employer to employer and from pier to pier as casual workers, working when they want, and when and where work is available. There is no regular weekly, or even daily, employment. Longshoremen may work for more than one employer in a single day, or during the same week. The total number of hours worked in any day or week varies widely. Irregularity of both daily and weekly hours is characteristic of the industry.

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16. Employment of longshoremen is wholly dependent upon the selection of men at one or another of the "shapes" at the head of each pier where work is to be done. At three stated hours during the day, namely at 7.55 a. m., 12.55 p. m. and 6.55 p. m., men seeking employment gather in a group or semicircle, constituting the "shape", at the head of a pier where work is available. The foreman stevedore then selects from the "shape" such men as he desires to hire, to work until "knocked off", that is, told to quit. The selection of a man from the shape carries with it no obligation on the part of the employer concerning any specified length of employment, except for work requirements of the Collective Agreement

1797



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1798

relating to minimum hours under specified conditions. The duration of employment depends entirely upon the determination of the stevedore or the steamship company. Where longshoremen work during "straight time" hours, it is customary for the employer to defer until about 4.30 p. m. his decision as to whether the men shall do work after 5 p. m. If it seems likely that night work will be required, the employer may definitely engage the men, or he may order them to shape at 6.55 p. m. If the men are directed to shape at 6.55 p. m. and the employer then

1799

decides not to work that night, because of weather conditions or other circumstances relating to the arrival or handling of cargo, he is at liberty not to hire any man at the 6.55 p. m. shape, and thereby he incurs no obligation for compensation. At times the men have been directed to shape up at hours other than the three specified shape hours hereinabove mentioned.

1800

17. Where men have been selected individually at the shape, they are organized into gangs of about 20 men, in charge of a foreman, and put to work loading or unloading a ship. Where a gang has been accustomed to work as a group, it is assigned to a particular hatch or job. A gang may hold together for a few hours, or it may operate as a unit as long as there is work in the hatch or ship, which may be for less than a day or for more than a week. They may, and sometimes do, work as a group on frequent occasions for one employer, being rehired recurrently at its piers. No gang, however, is employed regularly or steadily. The men are employed only when there is work to be done. At the end of a working period a gang may be told to "knock off", in which event the men would shape again at a later shaping hour, or on the next day, if they so desired, if work was available at the pier.



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1801

18. During the period in suit, the defendants in some instances adopted the practice of posting notices on bulletin boards of the arrival of ships, or of calling gangs, working customarily together, by a prior notice posted at the pier or by telephonic communication from the stevedoring foreman to the gang leader or hatch boss, and from him, in turn, to the individual men. This practice, however, did not bring about a departure from the established custom that the men shape up at the customary times, regardless of whether they had been working at that pier on the previous day or even earlier the same day.

1802

19. The amount of work which may be available for longshoremen in the Port of New York, and the time of the day or the day of the week when such work may be available, depend principally upon the number of ships in port and the length of their stay, and varies from day to day, week to week and season to season.

20. Under the terms of the Collective Agreement in effect during the period in suit, and under previous Collective Agreements in effect over a period of many years, the longshoremen in the Port of New York have been obligated to work any night of the week or on Sundays, Holidays or Saturday afternoons, when directed, with special limitations on Saturday nights.

1803

21. In practice, a longshoreman may work on more than one kind of cargo and in more than one capacity during the "straight time" hours or the "overtime hours", or both.

22. The stevedoring business in the Port of New York prior to World War II, had the following characteristics:



1804

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1805

About seven or eight stevedoring companies worked for one steamship company each, whereas about 60 other stevedoring companies, known as contracting stevedores, worked for a number of steamship lines. Before a ship docked in this port, the stevedores knew the vessel's definite or approximate date of departure and also the type of cargo to be discharged or loaded. Thereupon, they made a determination concerning the best way of handling the cargo at the lowest possible cost. Tentative plans for the handling of the cargo were readjusted from time to time on account of delayed arrival, necessity for repairs, delay in arrival of outgoing freight, weather conditions and other factors.

1806

Stevedoring companies never worked any more "overtime" than was necessary, because it was more economical for the steamship company, and more profitable to the stevedores, to work during "straight time" hours. It was the common practice for stevedoring companies to use auxiliary equipment, and to work the largest number of day gangs within the vessels' limitations of space and equipment. Permission to work "overtime" had to be obtained by the stevedoring company from the steamship company. The decision whether to work "overtime" was controlled by the necessity of meeting scheduled sailing dates in the case of passenger liners, and otherwise by financial considerations turning on whether the over-all cost of a later departure exceeded the cost of "overtime". The contract between stevedoring companies and steamship lines usually provided that the former would be paid on a tonnage basis, plus the actual cost of "overtime", including "overtime" differentials, insurance and Social Security taxes. For the most part, the longshoremen preferred to work during the daytime rather than during the night. The amount of "overtime" that the men worked depended to a con-



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1807

siderable extent upon the stevedoring companies by whom they were employed.

23. During World War II there was no change in the methods of hiring longshoremen, nor in the terms of the Collective Agreement, except in wage rates. More "overtime" was worked, because of the increased volume of cargo to be handled, larger numbers of ships, shortage of manpower and the wartime necessity of meeting convoy dates. The operation of all ships was taken over by the Army, Navy or War Shipping Administration, and substantially all stevedoring was performed for the account of the United States government. Permission to work "overtime" had to be obtained from the War Shipping Administration or the military authorities. During the war such permission was never refused. The contracts for the stevedoring services were on a tonnage basis.

1808

24. Since the end of actual hostilities, the business in the Port of New York has been returning to peace time routine, and in many respects has already reverted to the peace time patterns.

25. The steamship companies in the Port of New York have preferred to confine the handling of cargo to "straight time" hours to the greatest possible extent. They give permission to work "overtime" when such work is unavoidable. The 50 per cent over-riding charge for work done during "overtime" hours is a deterrent because of the added cost and the intensity of the competition between American ships and ships of foreign registry.

1809

26. Stevedoring companies try to avoid working "overtime" hours. Their contracts are entered into on a commodity tonnage basis. When permission is granted



1810

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to work "overtime", stevedores receive in addition to the commodity tonnage rate only the actual additional amounts paid out in wages, plus insurance and Social Security tax. "Overtime" work is less efficient than work in "straight time" hours. These factors contribute to the reduction of the stevedore's profits, if his employees are worked "overtime".

1811

27. The International Longshoremen's Association has sought to avoid "overtime" work, and to confine the work of the longshoremen as largely as possible to the "basic working day" as defined in the Collective Agreement, by making all hours outside of the basic working day "overtime", and by rendering such "overtime" sufficiently expensive so that the employers would avoid it whenever possible. The Union's objective has been to limit work to a normal day such as prevails generally in this country, so that its members might enjoy some of the leisure which was not formerly available to them. With some exceptions that has also been the wish of the individual members of the Union, including the plaintiffs. Some men, other than the plaintiffs, refused, even in

1812

war time, to work during the night, unless it was absolutely unavoidable. The employers found it difficult to get men to turn out for a 6:55 p. m. shape; they not infrequently did not show up at all, or flatly refused to work at night. Meetings were held by the Union's representatives with the military authorities to work out ways and means to avoid the establishment of a precedent for working around the clock.

28 (a). Prior to the Fair Labor Standards Act, the word overtime had a generally accepted meaning in American industry, namely, excess time, to which a penalty rate of compensation was applied to discourage such work. The idea of excessivity, however, was not an



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1813

indispensable element of the concept of overtime as understood. Overtime was also understood to cover hours outside of a specified clock pattern.

(b) Prior to the Fair Labor Standards Act, the "overtime" rate of compensation was usually one and one-half times the "straight time" rate. In a few instances the "overtime" rate was increased from one and one-half times to twice the "straight time" rate after a specified number of "overtime" hours had elapsed.

(c) The purpose of the demand of organized labor in American industry for penalty compensation for overtime was a two-fold one: to discourage work beyond a certain number of hours per week, and to discourage work during specified periods of the day. It was also prompted by the laborers' desire for a shorter work day, and was not generally intended as a method of increasing earnings. The use of overtime rates of pay did perform the function of preventing substantial amounts of overtime, except during the unusual conditions existing during the war period.

(d) A shift differential is a premium payment for work in either the second or third shift in a plant or industry where more than one shift is worked. The shift differential for the second shift is usually 5 cents or 10 cents per hour, and seldom exceeds 15 cents per hour.

(e) There is a difference between a shift differential and overtime premium. The former is an amount added to the normal rate of compensation, which is large enough to attract workers to work during what are regarded as less desirable hours of the day, and yet not so large as to inhibit an employer from the use of multiple shifts. The latter is an addition to the normal rate of compensation, designed to inhibit or discourage an employer from



1816

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using his employees beyond a specified number of hours during the week or during certain specified hours of the day. A safe guide for distinguishing between the shift differential and the overtime premium is by the degree of spread between the normal rate and the penalty rate. Whereas a shift differential is usually 5 or 10 cents per hour, the overtime premium is generally 50 per cent of the normal rate.

1817

29. Statistical studies of "straight time" and "overtime" work in the Port of New York show:

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(a) For the years 1932 to 1937, inclusive, the records of stevedoring companies, averaging six in number, in such years show that, on the average, 79.93 per cent of the total number of hours worked were within the "basic working day" as defined by the Collective Agreement. During the ten months between the effective date of the Fair Labor Standards Act, October 24, 1938 and August 31, 1939, shortly before the outbreak of the war, the corresponding percentage was 75.03 per cent, based upon a study of 17 stevedoring companies, together handling 70 per cent of the volume of work in the port. During the same ten months' period, out of the total number of "overtime" man hours, between 5 p. m. and 8 a. m., excluding Sundays and Holidays, 23.29 per cent was worked by men who had worked no "straight time" hours during the same day; and 42.19 per cent of such total "overtime" hours was worked by men who had previously worked no "straight time" hours or fewer than six "straight time" hours.

(b) During both periods mentioned, that is 1932-1937 inclusive, and October 24, 1938 to August 31, 1939, the work performed on Saturday afternoons, Sundays and Holidays, amounted to 4.94 per cent and 7.08 per cent



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1819

for each of the two periods respectively, of total man hours; work performed between 5 p. m. and 8 a. m. (exclusive of Sundays and Holidays) constituted 15.13 per cent and 17.89 per cent for each of the two periods respectively, of total man hours; and work performed between 5 p. m. and 8 a. m. (exclusive of Sundays and Holidays) by men who had performed no previous work during the "straight time" working hours of the same day was 2.57 per cent and 4.17 per cent for each of the two periods respectively of total man hours. The percentage of "overtime" man hours in relation to total man hours was 20.07 per cent and 24.97 per cent during each of the periods respectively.

1820

(c) During the mentioned ten months' period, 8.01 per cent of the longshoremen who worked in the Port of New York worked more than 40 hours a week for one employer. There is no indication, however, as to how many men did, in fact, work for more than one employer during the week and whose total number of hours exceeded 40. The percentage of total hours worked for one employer which is represented by work in excess of 40 hours a week was 2.94 per cent. There was 8.50 times as much contractual "overtime" as there was overtime measured by the number of hours in excess of 40 worked for one employer.

1821

(d) During the last full year of war experience before V-E Day, namely the last three-quarters of 1944 and the first quarter of 1945, 54.5 per cent of total man hours fell within the "basic working day" as defined by the Collective Agreement; work performed on Saturday afternoons, Sundays and Holidays constituted 20.5 per cent of total man hours; and work performed between 5 p. m. and 8 a. m. (exclusive of Sundays and Holidays) amounted to 25 per cent of total man hours; work performed between 5 p. m. and 8 a. m. (exclusive of Sundays and



1822

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Holidays) by men who had done no work previously during the same "straight time" working day was 11.1 per cent of total man hours, 24.4 per cent of total "overtime" man hours and 44.5 per cent of total "overtime" man hours worked between 5 p. m. and 8 a. m. (exclusive of Sundays and Holidays).

1823

(e) During the last full year of war experience, that is the period referred to in subdivision (d) above, the concentration of work within the contract "basic working day" was 2.4 times the concentration during the other 16 hours of the day; it was six times as great in the ten-months period referred to in subdivision (a) above; and almost eight times as great during the 1932-1937 period.

30. Night work, Sunday work, work on Saturday afternoons and on certain legal Holidays, have been compensated at rates higher than the prevailing day rates in the longshore industry in the Port of New York at least as far back as 1887.

1824

31. In the Port of New York from 1916, when the first agreement was made with the International Longshoremen's Association, down through the period in suit, the Collective Bargaining rates have been as follows for general cargo:

Year	Hourly Day Rate*	Hourly Night Rate*
1916	40 cents	60 cents
1917	50 "	75 "
1918	65 "	\$1.00
1919	80 "	1.20
1921	65 "	1.00
1922	70 "	1.07
1923	80 "	1.20
1927	85 "	1.30
1931	85 "	1.20
1932	75 "	1.10
1933	85 "	1.20



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1825

<i>Year</i>	<i>Hourly Day Rate</i>	<i>Hourly Night Rate</i>
1934	95 cents	\$1.35
1936	\$1.00	1.50
1937	1.05	1.60
1940	1.10	1.65
1941	1.20	1.80
1943	1.25	1.87½

\*In the 1916 and 1917 Collective Agreements the words "day work" and "night work" are used. From 1918 to 1937, inclusive, the Agreements identify the lower rate as being payable for the basic working hours, and the higher rate is made applicable to "all other time". 1826.

From 1938 to and including the period in suit, the Agreements speak of "straight time" and "overtime".

32. During the period from 1916 to 1918 the Collective Agreement for the longshore industry for the Port of New York specified one rate of pay for what was termed "day work", and a higher rate of pay for what was termed "night work", and a third rate of pay for work on Sundays and specified Holidays. From 1918 onward the Collective Agreements did not employ the terms "day" or "night". Night work, and work on Sundays and Holidays were collectively described as "all other work" and were compensated for at a single rate and the triple rate system was abandoned. 1827

33. In the Fall of 1938, after the enactment of the Fair Labor Standards Act, the Collective Agreement for the longshoremen's industry in the Port of New York introduced, with reference to work at night, Saturday afternoons, Sundays and Holidays, on general cargo, the terms "overtime" and "overtime which shall be paid for at the overtime rate". The parties, nevertheless,



1828

*Findings of Fact and Conclusions of Law.*

from the passage of the Fair Labor Standards Act through the period in suit, made no actual change in the general manner of compensating longshoremen as compared with that prevailing previously, except under the circumstances noted in Finding No. 43(a).

1829

34. During most of the period in suit the defendants required some longshore work practically around the clock, day in and day out, except Saturday nights. Defendant Huron employed some groups exclusively on night work. Defendant Bay Ridge assigned its gangs either to day or night work as shipping exigencies required, and its gangs frequently commingled day work with night work on different days in the same working week.

35. No stevedoring company worked exclusively from 8 a. m. to 5 p. m. and Saturday mornings. Even prior to World War II some stevedoring companies had fairly regular recourse to some night work.

1830

36. During the period in suit defendants endeavored to have longshoremen available for work in regular gangs which were called out by defendants to shape up as shipping exigencies required.

Some of the plaintiffs normally sought employment at other piers only when they could not get work at the piers served by the defendants sued herein. Even when ordered out by defendants, however, the gangs were required to shape up in the customary manner and no man had assurance of employment or guarantee of its duration, except for the provisions of the Collective Agreements for minimum hours of pay under specified conditions of employment.

37. The Collective Agreements, since the International Longshoremen's Association organized the longshoremen



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1831

in the Port of New York in 1916, reflect the desire and purposes of the Union to de-casualize employment, to concentrate employment during basic eight-hour day and to avoid "overtime", except when absolutely essential. The "basic working day" has been reduced from ten hours six days a week to eight hours on weekdays and half day on Saturday, and the hours outside such reduced daily schedule were at the same time always classified in the classification entitled to penalty compensation. For many years, including the period in suit, a clause was included in the Collective Agreement that "men shall work any night of the week, or on Sundays, Holidays or Saturday afternoons, when required." The unwillingness of the men to work at night is reflected by the provision of the Agreement requiring a minimum of four hours' compensation to men who are ordered to work at 5 or 6 p. m., who were not employed during the afternoon. The "overtime" rate for the most part has been at the conventional time and a half scale. The Collective Agreements did not employ the word "overtime" for all hours outside the basic work day until 1938, but the use of the word "overtime" occurs regularly in clauses relating to penalty cargo in all Agreements commencing in 1918. Both the Union and the employers, during their negotiations, referred to such hours as "overtime". In the Award rendered in 1918 by the National Adjustment Commission, the hours outside of the basic work day were labeled "overtime". The Collective Agreement for watchmen provides for a 24-hour day, with three eight-hour shifts.

1833

38. Various employments which are intimately related to the handling of cargo are established on the basis of a working day of eight hours, from 8 a. m. to 12 Noon and from 1 p. m. to 5 p. m. This applies to the



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1834

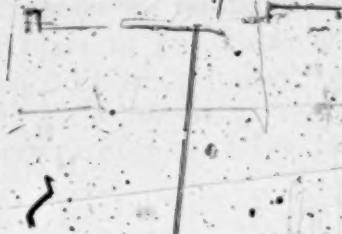
handling of cargo going off the pier by trucking companies and the clerical operations of steamship employees, painters, carpenters, cleaners and the like, and to Custom inspectors. The Collector of Customs at the Port of New York has determined hours, from 8 a. m. to 5 p. m., with one hour out for lunch, to be the normal working day for the loading and unloading of the vessels in the Port of New York. In the case of foreign shipments, work outside of those hours may be carried on only on a special permit issued by the Collector.

1835

39. The historical development of the Collective Agreements in the longshore industry in the Port of New York has followed the prevailing pattern in organized American industry. The objective of organized labor has been to shorten the total number of weekly hours and frequently to confine daily work to an agreed schedule of approximately eight hours. A mechanism for accomplishing this result has frequently been to schedule an approved tour of daily hours to be compensated for at a straight time rate and to classify all other hours as overtime hours compensable at an overtime rate. The employment of the 50 per cent premium for such overtime hours was designed to constitute a deterrent and not a prohibition. Such 50 per cent premium in the longshore industry has proved to be effective as a deterrent and is responsible for the high degree of concentration of longshore work in the Port of New York to the basic working day.

1836

40. The following chart sets forth the work pattern of each of the plaintiffs.









# Analysis of Work Patterns of

Date	Time	1	2	3	4	5	6	7	8	9	Number of units (of these which the following number of days were made -						
											1	2	3	4	5	6	7
1-9-44	8-25-44	47	14	27	5	8	3	67	3	0	1	0	2	2	2		
1-17-44	10-25-44	10	75	17	27	26	7.5	74.5	4	5	8	19	12	14	1		
1-23-44	2-4-44	14	78	28	8	6	9	14	2	1	0	2	1	2	4		
1-24-44	4-16-44	108	46	62	22	24	4	72	3	4	8	12	11	11	2		
1-2-44	4-16-44	80	15	27	5	10	8	63	4	3	3	0	3	1	1		
1-8-44	10-25-44	77	76	1	45	31	5	74.5	6	3	9	20	21	16	1		
1-10-44	10-25-44	81	72	9	30	42	3	66	8	11	14	14	14	11	0		
1-7-44	10-15-44	63	96	17	40	6	7	66	1	2	0	5	12	11	15		
1-24-44	10-25-44	79	46	33	20	26	9.5	65	5	5	3	15	12	6	6		
1-1-44	10-25-44	78	74	4	48	26	11	74.5	2	3	7	19	24	18	1		
1-2-44	11-26-44	35	11	24	3	8	7	58									
1-2-44	12-21-44	62	29	13	19	20	10	81									
1-13-44	12-8-44	43	14	29	3	11	1	76									
1-2-44	12-10-44	50	35	15	11	24	5	70									
1-2-44	12-10-44	50	31	20	12	19	2	73									
1-23-44	4-3-44	13	6	27	1	5	15	52									
1-30-44	5-27-44	31	19	12	9	10	6	76									
1-23-44	12-24-44	49	40	9	24	16	19	76									
2-13-44	5-21-44	15	5	10	1	4	11	44.5									
1-16-44	12-24-44	50	46	4	30	16	9.5	85									

FIGURES NOT AVAILABLE







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Number of birds (of this  
 - species) in which the following  
 - any number of days  
 - were included -

0-9 10-19 20-29 30-39 40-49 50-59

77							12	
3	2	0	3	3	1	2	255	
1	4	11	10	19	8	10	8	255
1	2	1	2	1	5	2	320	215
2	3	4	15	14	6	2	833.5	961
1	3	5	1	3	1	1	205.5	220
1	6	7	17	20	14	11	0.	2270
2	12	13	15	11	12	7	0.	2590
1	2	0	3	15	13	12	1040.	1005
1	5	7	13	9	10	1	0.	1747.5
0	3	8	15	18	19	11	6.5	3322.5
TOTAL HURON							2926.5	16094.5
2	3	1	2	1	2	0	52.	99.
0	4	8	8	3	7	9	318.5	950.
3	4	3	1	1	1	1	28.	150.6
4	5	6	9	2	5	4	298.5	244.6
2	6	3	8	2	6	4	103.	576.5
0	2	1	2	0	1	0	44.	8.
1	5	2	2	5	3	1	204.	250.
0	4	6	9	2	7	15	511.	1158.
0	2	1	1	1	0	0	0.	44.5
1	5	4	6	3	8	19	715.5	1215.5
TOTAL BAY RIDER							2279.5	4696.5
GRAND TOTAL							5206	20791.

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1840

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41. An examination of the employment record of each of the plaintiffs shows that their work followed no regular pattern. There were many weeks during which they were not employed by the defendants. They worked varying numbers of days in different weeks. The number of hours worked on the days when they did work varied greatly. Many weeks they worked less than 40 hours; other weeks more than 40 hours. They handled a variety of cargoes, and some of them worked at various times as headers, gangwaymen or assistant foremen.

1841

42. During the period in suit the defendants paid plaintiffs the "straight time hourly rate" for work performed during the contract "straight time" hours and the "overtime hourly rate" for work performed during the contract "overtime" hours, plus the customary differentials for work performed as headers, gangwaymen and assistant foremen. These rates were paid by the defendants regardless of whether plaintiffs worked more or less than 40 hours a week, with the single exception stated in Finding No. 43 (a).

1842

43 (a). If, and only if, a longshoreman worked more than 40 hours between 8 a. m. and 12 noon, and 1 p. m. and 5 p. m. on Mondays to Fridays, inclusive, and between 8 a. m. and 12 noon on Saturday of that workweek, none of these days being a holiday, he was paid an additional sum for work on Saturday morning in excess of 40 hours—namely 62½ cents per hour, plus, when applicable, the differentials mentioned in Finding No. 11; however, he was not paid an additional 50 per cent of the differentials. In the case of some of the plaintiffs employed by Bay Ridge, namely, Alston, Roper and Tolbert, the testimony was not clear whether they were paid the additional 62½ cents per hour for Saturday morning work under the above circumstances. However, the defendant



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1843

Bay Ridge has conceded, for the purpose of this trial, that these three men were not so paid when they worked for that company in New Haven in certain weeks.

(b) A longshoreman who worked on general cargo in excess of 40 hours a week, all of his working hours being "overtime" hours, was paid the "overtime" hourly rate of \$1.87½ an hour, for all hours both within and beyond 40.

(c) A longshoreman who worked on general cargo 40 hours or more during "overtime" hours, and also worked on Saturday from 8 a. m. to 12 noon during the same workweek, received \$1.87½, the "overtime hourly rate", for the "overtime" hours, and \$1.25, the "straight time hourly rate", for the Saturday hours.

1844

(d) A longshoreman who worked on general cargo for eight hours on Monday, from 8 a. m. to 5 p. m., and ten "overtime" hours during each of the following four days and also on Saturdays from 8 a. m. to noon, received compensation at the "straight time" rate for Monday and Saturday, and the "overtime" rate for the other hours.

(e) A longshoreman who worked on general cargo for 40 hours or less during the week, all of these hours being within the "overtime" classification, was paid the "overtime hourly rate" of \$1.87½ per hour.

1845

44. During the period in suit, the plaintiffs, if they so desired, worked Sundays and Holidays whenever work was available to them, just as any other day.

45. The "basic working day" and the "basic working week" referred to in the Collective Agreement were not the working day or working week normally, regularly or usually worked by plaintiffs during the period in suit.



1846

*Findings of Fact and Conclusions of Law.*

46. During the period in suit, it was not unusual for the plaintiffs, in their employment by defendants, to start their work on a ship at night rather than by day, and it was not unusual to start their work on Saturday afternoon or Sunday.

47. It has been stipulated by the parties that the amounts due the plaintiffs in those situations in which the Court has held that liability exists, are as follows, exclusive of liquidated damages and attorneys' fees:

1847	Name	Defendant	Amount
	Christian Elliott .....	Huron	.73
	Joseph Short .....	"	.35
	Albert Alston .....	Bay Ridge	5.14
	James Brooks .....	"	.93
	Louis Carrington .....	"	2.28
	James Hendrix .....	"	.60
	Austin Johnson .....	"	1.00
	Carl Roper .....	"	8.50
	Nathaniel Tolbert .....	"	18.02

**CONCLUSIONS OF LAW.**

1848

1. The Court has jurisdiction of the parties hereto and of the subject matter of these actions.

2. During the period in suit, the plaintiffs enumerated in Finding of Fact No. 2 were employees of defendant Huron Stevedoring Corp., and plaintiffs enumerated in Finding of Fact No. 3 were employees of defendant Bay Ridge Operating Co. Inc. and all were engaged in commerce within the meaning of, and entitled to the benefits of, the Fair Labor Standards Act of 1938 (hereinafter referred to as "the Act").



*Findings of Fact and Conclusions of Law.*

1849

3. The "straight time hourly rate" set forth in each subdivision of Paragraph 4 of the Collective Agreement, as stated in Finding of Fact No. 9, constituted the regular rate at which plaintiffs were employed when handling the stated kind of cargo. During those periods when a plaintiff was employed as a header, gangwayman or assistant foreman, as defined in Finding of Fact No. 11, the regular rate was that applicable to the kind of cargo being handled, plus 5 cents, 5 cents and 15 cents per hour respectively.

4. The defendants did not violate Section 7 (a) of the Act, and did not fail to pay the plaintiffs herein compensation for their employment in excess of 40 hours during any workweek at a rate not less than one and one-half times the regular rate at which plaintiffs were employed, during the period in suit, in accordance with the provisions of Section 7 (a) of the Act, except (1) in failing to pay some of the plaintiffs in accordance with the provisions of that section in some workweeks in which they worked more than 40 hours and some of their work was performed in the capacity of header, gangwayman or assistant foreman; (2) in some workweeks in which they worked more than 40 hours and some of their work was performed on penalty cargo as referred to in Paragraphs 4(b), 4(c), 4(d) or 4(e) of the Collective Agreement, as set forth in Finding of Fact No. 9; (3) with respect to plaintiffs Alston, Roper and Tolbert, in their employment by defendant Bay Ridge, as stipulated and referred to in Finding of Fact No. 43 (a), in certain workweeks when they worked for that defendant in New Haven, Connecticut.

1850

1851

5. The following plaintiffs are entitled to judgment for unpaid overtime compensation, and are also entitled to



1852

*Findings of Fact and Conclusions of Law.*

judgment for an additional equal amount in each case as liquidated damages, in the amounts set opposite their names respectively below, together with costs.

1853

Name	Overtime Compensation	Liquidated Damages	Total
Christian Elliott .....	\$ 1.73	\$ .73	\$ 1.46
Joseph Short .....	.35	.35	.70
Albert Alston .....	5.14	5.14	10.28
James Brooks .....	.93	.93	1.86
Louis Carrington .....	2.28	2.28	4.56
James Hendrix .....	.60	.60	1.20
Austin Johnson .....	1.60	1.60	3.20
Carl Roper .....	8.50	8.50	17.00
Nathaniel Tolbert .....	18.02	18.02	36.04

6. As stipulated by the parties hereto, the determination of the reasonable attorneys' fees is reserved until ultimate disposition of both the severed actions and the remaining actions mentioned in Findings of Fact Nos. 2 and 3.

1854

Dated: March 4, 1947.

Simon H. Rorick,  
U. S. D. J.

2



## Judgment.

1855

## UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Civ. 33-212.

Leo Blue, et al.,

Plaintiffs,

against

Huron Stevedoring Corp.,

1856

Defendant.

The issues in the above entitled action having been regularly brought on for trial before Honorable Simon H. Rifkind without a jury at a Term of this Court appointed to be held for the trial of civil cases on June 17, 20, 21, 24 and 25, 1946, and the parties having appeared by counsel, and the issues herein having been duly tried upon the proofs submitted in behalf of the respective parties, and the Court having duly rendered its decision and made its Findings of Fact and Conclusions of Law directing that judgment be entered in favor of the following plaintiffs, in the following amounts:

1857

Christian Elliott .....	\$1.46.
Joseph Short .....	.70;

and the costs and disbursements of plaintiffs being duly taxed in the sum of \$263.18, and the Court having ordered dismissed on the merits the claims of the following plaintiffs: Leo Blue, Nathaniel Dixon, Tony Fleetwood, James Fuller, Joseph J. Johnson, Sherman McGee, Alonzo Steele and Whitfield Toppin; and having, pursuant to stipulation of the parties, ordered severed and allowed to re-



1858

*Judgment.*

main on the docket of this Court claims of all plaintiffs in this action except those named in this judgment, and having, pursuant to stipulation of the parties, reserved determination and award of reasonable counsel fees until ultimate disposition of both the actions of the foregoing plaintiffs and the remaining actions of those plaintiffs whose cases have been permitted to remain upon the docket, and the Court hereby retaining full jurisdiction of the cause for that purpose,

Now, on motion of Max R. Simon, Esq., and Goldwater  
1859 & Flynn, Esqs., attorneys for plaintiffs, it is

ADJUDGED that plaintiff Christian Elliott recover of defendant the sum of \$1.46; and it is further

ADJUDGED that plaintiff Joseph Short recover of defendant the sum of \$.70; and it is further

ADJUDGED that the claims and complaints of plaintiffs Leo Blue, Nathaniel Dixon, Tony Fleetwood, James Fuller, Joseph J. Johnson, Sherman McGee, Alonso Steele and Whitfield Toppin are hereby dismissed on the merits; and it is further

ADJUDGED that plaintiffs Christian Elliott and Joseph  
1860 Short recover of defendant \$263.18 costs; and it is further

ADJUDGED that these plaintiffs have execution therefor.

Dated, New York, N. Y., March 28, 1947.

APPROVED:

SIMON H. RIVKIND,  
United States District Judge.

Judgment rendered:

WILLIAM CONNELL,  
Clerk of the United States,  
District Court for the Southern  
District of New York.



Judgment.

1861

UNITED STATES DISTRICT COURT,

Southern District of New York

Civ. 33-213.

JAMES AARON, et al.,

Plaintiffs,

against

BAY RIDGE OPERATING CO., INC.,

Defendant.

1862

The issues in the above entitled action having been regularly brought on for trial before Honorable Simon H. Rifkind without a jury at a Term of this Court appointed to be held for the trial of civil cases on June 17, 20, 21, 24 and 25, 1946, and the parties having appeared by counsel, and the issues herein having been duly tried upon the proofs submitted in behalf of the respective parties, and the Court having duly rendered its decision and made its Findings of Fact and Conclusions of Law directing that judgment be entered in favor of the following plaintiffs, in the following amounts:

Albert Alston .....	\$10.28
James Brooks .....	1.86
Louis Carrington .....	4.56
James Hendrix .....	1.20
Austin Johnson .....	3.20
Carl Roper .....	17.00
Nathaniel Tolbert .....	36.04

1863

and the costs and disbursements of plaintiffs being duly taxed in the sum of \$263.18; and the Court having ordered dismissed on the merits the claims of the following plaintiffs: James Aaron, Albert Green and Marc Stephens, and having, pursuant to stipulation of the parties, ordered severed and allowed to remain on the docket of this Court claims of all plaintiffs in this action except those named in



1864

## Judgment.

this judgment, and having, pursuant to stipulation of the parties, reserved determination and award of reasonable counsel fees until ultimate disposition of both the actions of the foregoing plaintiffs and the remaining actions of those plaintiffs whose cases have been permitted to remain upon the docket, and the Court hereby retaining full jurisdiction of the cause for that purpose,

Now, on motion of Max R. Simon, Esq., and Goldwater & Flynn, Esqs., attorneys for plaintiffs, it is

1865

ADJUDGED that plaintiff Albert Alston recover of defendant the sum of \$10.28; plaintiff James Brooks recover of defendant the sum of \$1.86; plaintiff Louis Carrington recover of defendant the sum of \$4.56; plaintiff James Hendrix recover of defendant the sum of \$1.20; plaintiff Austin Johnson recover of defendant the sum of \$3.20; plaintiff Carl Roper recover of defendant the sum of \$17.00 and plaintiff Nathaniel Tolbert recover of defendant the sum of \$36.04; and it is further

ADJUDGED that the claims and complaints of plaintiffs James Aaron, Albert Green and Mary Stephens are hereby dismissed on the merits; and it is further

1866

ADJUDGED that plaintiffs Albert Alston, James Brooks, Louis Carrington, James Hendrix, Austin Johnson, Carl Roper and Nathaniel Tolbert recover of defendant \$263.18 costs; and it is further

ADJUDGED that these plaintiffs have execution therefor.

Dated, New York, N. Y., March 28, 1947.

APPROVED:

SIMON H. RIGGIN,

United States District Judge.

Judgment rendered:

WILLIAM CONNELLY,

Clerk of the United States,

District Court for the Southern

District of New York.



**Motion for New Trial, to Open Judgment to Take  
Additional Testimony, and for Amended  
and Additional Findings of Fact.**

1867

**IN THE  
DISTRICT COURT OF THE UNITED STATES**

**FOR THE SOUTHERN DISTRICT OF NEW YORK**

**Civil Action.**

**File No. 33-212.**

1868

**LEO BLUE, ET AL.,**

**Plaintiffs,**

**against**

**HUBON STEVEDORING CORP.,**

**Defendant.**

**Civil Action.**

**File No. 33-213.**

1869

**JAMES AARON, ET AL.,**

**Plaintiffs,**

**against**

**BAY RIDGE OPERATING CO. INC.,**

**Defendant.**

**Sir:**

**PLEASE TAKE NOTICE that on Tuesday, April 15, 1947, at  
10:30 a.m., in Room 506 of the Federal Courthouse, Foley**



1870

*Motion for New Trial, to Open Judgment to Take Additional Testimony, and for Amended and Additional Findings of Fact.*

1871

Square, New York City, plaintiffs will move the United States District Court under Rules 52 (b) and 59 (a) of the Federal Rules of Civil Procedure, upon the annexed affidavit of James L. Goldwater, Esq., verified the 7th day of April, 1947, and upon all the proceedings heretofore had herein, for an order granting a new trial in the above actions for the purpose of and to the extent necessary for taking additional testimony, and amending and correcting the Findings of Fact and Conclusions of Law signed by the Court on March 4, 1947 on the ground that:

1872

1. The communication dated May 6, 1946 from Harold C. Nystrom, Chief, Wage-Hour Section in the office of the Administrator of the Wage and Hour Division of the United States Department of Labor, to Lemuel H. Davis, Regional Attorney of the Division in Richmond, Virginia, printed in Appendix A in plaintiffs' printed brief submitted to the Trial Court in these actions, and Tables 1, 3 and 4 presenting certain data compiled by plaintiffs and printed in Appendix B in plaintiffs' printed brief submitted to the Trial Court, which were not available to plaintiffs' attorneys during the trial, should be admitted by the Court to the record in these consolidated cases by the taking of additional testimony.

2. The Court erred in including in the findings as signed findings 8-12, 22-29, 37-39, and in receiving the testimony and exhibits upon which these findings were based, and the findings should be amended and corrected to strike these findings.

3. The Court omitted to include in its findings as signed certain findings requested by plaintiffs as follows,



*Motion for New Trial, to Open Judgment to Take Additional Testimony, and for Amended and Additional Findings of Fact.* 1878

and the findings should now be amended to include as additional findings the following, as originally requested by plaintiffs:

(1) During the period in suit plaintiffs frequently worked for defendants stretches lasting straight through the night and a considerable portion of the next day. Occasionally plaintiffs worked around the clock without stopping except for meal periods, and sometimes they worked 48 hours at a single stretch. 1874 Their compensation in such instances always changed from the "overtime" to the "straight time" rate, or vice versa, as the case might be, at 8 a.m. and 5 p.m., respectively, regardless of the number of hours previously worked in the day or week.

(2) During the period in suit plaintiffs looked for work, and were employed by defendants whenever work was available, on Saturday afternoons, Sundays and holidays just the same as on any other day of the week or year. They worked with little less frequency on those days than on any other day of the week or year. It was normal, regular and usual for plaintiffs to work on such days. There were some weeks in which Sunday, or even Sunday night, was the only time in the whole week when plaintiffs found work available. 1875

(3). During the period in suit plaintiffs would have preferred day work but, because they found it extremely difficult to get day work, they worked mostly at night for defendants in order to earn a living. It was normal, regular and usual for them to work at night.



1876 *Motion for New Trial, to Open Judgment to Take Additional Testimony, and for Amended and Additional Findings of Fact.*

(4) During the period in suit a very substantial portion of the work of plaintiffs on Saturdays, Sundays and holidays appears to have been work at night. In the case of the Huron plaintiffs the proportion was 65%.

1877 (5) Defendant Huron from time to time penalized longshoremen who did not show up for work on a Saturday, Sunday or holiday when their gangs had been ordered out by denying them any work for a full week thereafter.

(6) During the period in suit defendants, because of the evident reluctance of longshoremen to work at night, found it necessary to recruit gangs to do night work. This was essential to efficient shipping operations.

1878 (7) During the period in suit plaintiffs were called out to work in gangs by notification from defendants, and defendants thus not only controlled, but determined in advance, the time of day and the day of the week when the particular gangs would be called out.

(8) During the period in suit plaintiffs in their employment by defendants whenever they worked during one or more of the hours between 5 p.m. and 8 a.m. were compensated by defendants for all such hours at the same rates of pay, namely, the "overtime rates", regardless of whether or not they had previously in the same workday or workweek also worked some hours between 8 a.m. and 12 noon and



*Motion for New Trial, to Open Judgment to Take Additional Testimony, and for Amended and Additional Findings of Fact.* 1879

1 p.m. and 6 p.m. for which they had been compensated at the "straight time" rates and regardless of the number of hours previously worked at the latter rates.

(9) During the period in suit it was customary, regular and normal for plaintiffs in their employment by defendants to work both Saturday morning and Saturday afternoon if they worked at all that day. Such data as were made available to plaintiffs by defendants indicated that, in the case of Huron employees, in only about 6% of instances did longshoremen work Saturday morning hours without also working Saturday afternoon hours. It was far more common for them to work Saturday afternoon without having previously worked Saturday morning. 1880

(10) During the period in suit it was customary, regular and normal for plaintiffs in their employment by defendants to work workdays in excess of, and workdays less than, 8 hours per day. Such data as were made available to plaintiffs by defendants indicated that, in the case of Huron employees, in only about 6% of instances did longshoremen work an 8-hour workday; they worked a workday of 11 hours or longer in more than 50% of their workdays. 1881

4. The Court erred in applying the Fair Labor Standards Act to the facts of the case and its judgment was contrary to law.



- 1882 *Motion for New Trial, to Open Judgment to Take Additional Testimony, and for Amended and Additional Findings of Fact.*

PLEASE TAKE FURTHER NOTICE that defendants may have until 10 days from service hereof with which to submit any affidavit in opposition to this motion.

Dated, New York, N. Y.,  
April 7, 1947.

Max R. Simon, Esq.,  
225 West 34 Street,  
New York, N. Y.

and

Goldwater & Flynn, Esqs.

By JAMES L. GOLDWATER  
A Member of the Firm.  
60 East 42 Street,  
New York, N. Y.

Attorneys for Plaintiffs.

1883

To:

- 1884 JOHN F. X. MCGOHEY, Esq.,  
United States Attorney,  
Attorney for Defendants,  
United States Courthouse,  
Foley Square,  
New York, N. Y.



**Affidavit of James L. Goldwater in Support of Motion  
for New Trial, Etc.**

1885

IN THE  
DISTRICT COURT OF THE UNITED STATES,  
FOR THE SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

STATE OF NEW YORK,  
CITY AND COUNTY OF NEW YORK, ss.:

1886

JAMES L. GOLDWATER, being duly sworn, deposes and  
says:

1. I am an attorney associated with Goldwater & Flynn, Esqs. who are co-counsel with Max R. Simon, Esq. as attorneys for plaintiffs in the above entitled actions which were consolidated for trial and tried by this Court in June of 1946. I am familiar with all of the proceedings heretofore had in the actions, having been personally charged with their conduct.

1887

2. This affidavit is submitted in support of motions under Rules 59 (a) and 52 (b) of the Rules of Civil Procedure for the District Courts of the United States for an order granting to plaintiffs a new trial for the purpose of and to the extent necessary for obtaining the re-opening of the record here to receive as testimony certain exhibits which were submitted to the Court in appendices to plaintiffs' brief following trial but which were not available at the time when the parties rested for offer as exhibits of record. These exhibits have an important bearing upon the case, and were presumably considered by the Trial



1888

*Affidavit of James L. Goldwater.*

Court in arriving at its decision. Further, the defendants had ample opportunity in the permission accorded for the submission of reply briefs to comment upon and answer to any of the matters presented by the exhibits in question prior to the decision of the Court and cannot now claim to be surprised by this application.

1889

3. There are two other items of relief sought by this application. The Court is asked to strike all findings related to certain lines of proof developed as part of defendants' case on the ground that the evidence upon which these findings were based was improperly admitted and received and the resulting judgment represents an improper application of the Fair Labor Standards Act of 1938 to the appropriate facts and is contrary to law. Further, plaintiffs ask for the amendment of the findings to include additional items which were originally requested by plaintiffs but omitted from the findings as signed, apparently through oversight. These cover items of proof not embraced within the scope of other findings and in their absence the findings do not completely and adequately cover the case. Some of these matters will be discussed in greater detail hereafter.

1890

4. On January 21, 1946 deponent wrote Marvin C. Taylor, Esq., the member of the staff of the Attorney General of the United States who later tried this case for defendants and who was then engaged in its preparation. The letter included, in part, the following request:

"May we also request that you advise us promptly as to when we may be furnished with the following information which we have requested of you in our previous discussions, in keeping with our agreement to proceed informally with the pre-trial developments:

1. Copies of any opinions rendered by the Administrator of the Wage and Hour Division or the



*Affidavit of James L. Goldwater.*

1891

Solicitor of Labor or representatives of either covering the question at issue in these cases.

2. Copies of any surveys, statistical reports or studies in your possession prepared by the United States Bureau of Labor Statistics, or any other subsidiary office of the United States Department of Labor, at your request, in connection with the question at issue.
3. Copies of any surveys, statistical reports or studies prepared by professional economists, economic departments of universities, or other similar authorities, at your request, in connection with the question at issue.

1892

• • • We also make the request on the ground that a substantial amount of this material and data was acquired by your office in its official capacity as a representative of the United States Government, calling upon other agencies of the United States Government for available data or the assembling of such data. As we understand it, it is the policy of the United States Department of Labor and other Government departments, when furnishing such data to representatives of the parties upon one side of a controversy, to also furnish copies to representatives upon the other side. We believe that fairness in the dealings of the Government with the public also would require this. Finally, may we suggest that fair consideration of our request at this time may expedite preparation of these cases for prompt trial without the need of the usual formal pre-trial procedure before the Court."

1893

In fairness to Mr. Taylor, we admit at this point that he subsequently wrote us that "no commitments whatever were made" with regard to this type of material at pre-



1894

*Affidavit of James L. Goldwater.*

1895

vious discussions between the attorneys and, at a later date, "that his response to this suggestion was that you should promptly initiate any steps in this direction which you have in mind and that whatever you may do is a matter for your own decision rather than a matter for agreement between your office and ours". Subsequently, we advised Mr. Taylor by letters dated March 20, 1946 and April 13, 1946, of the need for receiving an adequate pre-trial discovery of the matters covered by our previous communication and in the latter communication we referred to letters written by the Wage and Hour Division to correspondents, whom we mentioned by name, copies of which we were sure must have been made available to the Government in the course of preparing its defense.

1896

5. In completing preparation for trial, Mr. Taylor made available to plaintiff's attorneys at the end of May or beginning of June copies of several letter opinions of various officers of the Wage and Hour Division. These were subsequently introduced into evidence by the parties as Plaintiffs' Exhibit 18 and Defendants' Exhibits N and O. Since the consolidated cases were tried in June, there was not available to the parties, however, before both sides rested, a copy of a communication dated May 6, 1946 from Harold C. Nystrom, Chief, Wage-Hour Section of the United States Department of Labor, to Lemuel H. Davis, Regional Attorney of the Division in Richmond, Virginia. So that the Court would have before it all of the possibly applicable material bearing upon the important questions involved in these cases, plaintiffs printed this communication in Appendix A to the brief submitted to the Court after trial. A copy of this opinion as there included is annexed to this affidavit as Exhibit A and made a part of these motion papers.

6. Shortly before the trial, upon the signing of various stipulations to simplify the trial procedure, defendants



*Affidavit of James L. Goldwater.*

1897

made available to plaintiffs certain statistical data, which the Government had had prepared in connection with the defense, covering stevedoring operations in the Port of New York over many years, but not embracing a period of time contemporaneous with any part of plaintiffs' period of employment. Over plaintiffs' opposition, this data in tabular form was subsequently admitted in evidence as Defendants' Exhibits D and E. Only upon the eve of the trial did defendants make available a table containing statistical data relating to stevedoring operations in the Port of New York covering a period contemporaneous with plaintiffs' employment. Over plaintiffs' opposition, this was subsequently admitted in evidence as Defendants' Exhibit J.

1898

7. Plaintiffs could not, during the trial, arrange for the compilation of statistical data in an attempt to meet the effect of Defendants' Exhibit J. Mr. Taylor had previously told the plaintiffs that while some work had been done upon a statistical survey covering a period contemporaneous with plaintiffs' employment, he did not believe that he would have it ready in time for the trial. As soon as the trial was completed counsel prepared from the rather limited data, which defendants had made available to plaintiffs in the form of records transcripts upon the examination before trial of defendants, Tables 1, 3 and 4 of Appendix B to plaintiffs' printed brief submitted to the Trial Court after the trial. Copies of these tables in the exact form in which they were previously printed are annexed to this affidavit as Exhibits B-1, B-2 and B-3, respectively, and made a part of these motion papers.

1899

8. In the interest of justice, to admit into the record material which plaintiffs could not obtain in time for the trial but which was available to the Trial Court at the time of its decision, it is submitted that the Court should grant



1900

*Affidavit of James L. Goldwater.*

a new trial to the extent necessary to re-open the record under Rule 59 (a) for the purpose of admitting Exhibits A and B annexed hereto as additional testimony.

1901.

9. Also in this motion the Court is requested to strike numerous findings from the Findings of Fact and Conclusions of Law as signed. The findings referred to all relate either to the statistical surveys previously referred to, or to certain collective agreements covering longshore operations in the Port of New York or to general conditions or characteristics of stevedoring operations unrelated to the work of plaintiffs in their employ by the defendants in these two cases. The motion in this regard is based upon plaintiffs' contention that these matters are not relevant to their claims in any way and not binding upon them, and the Court thus erred in permitting, over plaintiffs' opposition, the lines of testimony upon which these findings were based; and also upon the holding by the Supreme Court of the United States that matters of custom and collective contract do not control in testing compliance with Section 7 of the Fair Labor Standards Act. *Tennessee Coal Co. v. Muscoda Local No. 12*, 321 U. S. 590; *Jewell Ridge Coal Corp. v. Local 6167*, 325 U. S. 161; *Walling v. Helmerich & Payne*, 323 U. S. 37; *Walling v. Harnischfeger Corp.*, 325 U. S. 427; see also *Walling v. Alaska Pacific Consol. Mining Co.*, 152 F. (2d) 812, cert. den. 66 S. Ct. 960; *Robertson v. Alaska Gold Mining Co.*, 157 F. (2d) 876, cert. den. S. Ct.

1902

WHEREFORE, plaintiffs pray for the relief applied for by this motion.

(Sworn to by James L. Goldwater on April 7, 1947.)



**Exhibit A, Annexed to Foregoing Affidavit.**

1903

**UNITED STATES DEPARTMENT OF LABOR****OFFICE OF THE SOLICITOR**

July 31, 1946

**Legal Field Letter  
No. 109*****Attached Opinions***

Copies of recent opinions on subjects indicated below.  
are furnished herewith for your information and proper 1904  
notation in the Index to Legal Field Letters.

. . . . .

**SOL:ERG:YS**

May 6, 1946

**To****Lemuel H. Davis, Regional Attorney  
Richmond, Virginia****From****Harold C. Nystrom  
Chief, Wage-Hour Section**

1905

**Subject****Federal Lithograph Company  
Washington, D. C.  
File No. 8-817**

This will reply to your memorandum of June 13, 1945  
transmitting the subject file in which you inquire whether  
premium compensation paid for night contract work to  
different groups of subject's employees constitutes extra  
compensation creditable—in whole or in part—against the



1906

*Exhibit A, Annexed to Foregoing Affidavit.*

overtime required to be paid under the Walsh-Healey and Fair Labor Standards Acts. Since your inquiry raised questions analogous to those involved in several cases concerning stevedores (now in litigation), our reply was necessarily delayed pending consideration of this matter both by this office and by the Solicitor's Office in Washington.

1907

The file indicates that beginning with July 1942, subject firm has been reproducing books, pamphlets, orders, releases, etc., for the Government Printing Office. Certain of the Government contracts call for what is known as "overnight" service. The GPO sends up the orders to be printed each night, and the firm is required to have such orders completed by 8 a. m. the following day. The inspector's narrative report in the file states that the employer hand-picked several of his best employees to perform this night work. Some were to work only at night; some were to work on other work during the day and to work for a while at night on these contracts; still others were to alternate on the day shift for a while and then on the night shift for a while. The inspector states that subject firm "set up night rates of approximately  $1\frac{1}{2}$  times

1908

the regular day rates for most of the employees. Some rates were set up at double time. Some at slightly less than time and one-half others at slightly more than time and one-half. The employer explained that he had set up these rates this way to eliminate bookkeeping as he figures that he was paying all employees working at the night rate at least time and one-half the employee's regular rate of pay—the day rate."

The inspector considered the company in violation, stating: " \* \* \* these rates were paid for all hours worked regardless of whether or not they were overtime hours and therefore became the employees' regular rate of pay for work performed at night." The file further reveals



*Exhibit A, Annexed to Foregoing Affidavit.*

1909

that some employees' night rates started at 8 p. m., some at 9 p. m., some at 10 p. m., some at 11 p. m. and some at 12 p. m. Certain of the information contained in the file indicates that this premium compensation is paid only for work performed at night on GPO contracts although elsewhere in the file it is suggested that, with respect to regular nightshift employees, premium compensation is paid regardless of the character of the work performed at night.

According to your memorandum of June 13 and Regional Director Cole's memorandum of June 2, 1945, 1910 the company's wage differential plan consists of paying employees who have already worked on the day shift double time for all night work performed. Those employees who have not worked on the day shift, but who work on the night shift only, are paid the regular day-shift rate plus an additional half time for all hours worked on the night shift. These rates, you state, are paid "for work performed at night regardless of the number of hours worked during the week." You do not explain the basis on which it appears, as the file indicates, that certain of the dayshift employees receive only an additional half time for work performed at night, 1911 although it may be that double time is paid such employees for work on the night shift only when such work is performed on GPO contracts. See, for example, the pay-roll transcriptions of Robert Wathen. See, also, the employee statements of Olin Merchant and Max Guervitz in the file. It is your opinion, and that of Regional Director Cole, that overtime violations of both the Walsh-Healey and Fair Labor Standards Acts have occurred during weeks in which more than 40 hours were worked on one or both shifts and during 24-hour periods where more than 8 hours were worked. Thus, Regional Director Cole points out that if an employee works on a night



1912

*Exhibit A, Annexed to Foregoing Affidavit.*

shift only, he will receive the regular day-shift rate plus an additional half time, regardless of whether he works 20 hours, 35 hours, or 60 hours in the week.

1913

After reviewing subject file, we are of the opinion that the premium rates paid to regular night-shift employees for night-shift work constitute higher straight-time rates of pay, rather than overtime compensation creditable against the overtime required to be paid under the Walsh-Healey and Fair Labor Standards Acts. See, in this connection, the opinion expressed in Field Operations Bulletin, Vol. VII, No. 12, pages 207, 208. Insofar as the regular night-shift employees are concerned (who, in general, receive time and one-half the day-shift rate for all work performed at night), it seems clear that such compensation represents merely a higher rate of pay for the more onerous work performed at night. Since such an employee is paid at the premium rate regardless of the number of hours worked during the week, and since the hours worked at night by such an employee represents his normal working hours, we do not perceive any basis for holding that such premium pay constitutes overtime compensation. See, in this connection, Julia O'Toole's state-

1914

ment in the file which states that she begins work at 12 midnight and works until 8 a. m.; is now paid 90 cents per hour; that girls working on the night shift are paid at a higher rate than those working on the day shift; and that "it was not my understanding that this was an overtime rate but I was told that this would be equivalent to overtime." See, also, the employee statement of George Hummer Cf. Roger M. Doyle's pay-roll records indicating that he was paid at the night-shift rate of \$3 an hour, regardless of the fact that during given workweeks he performed no work at all during the day; also, E. A. Gaylor's statement and pay-roll transcriptions indicating that during the weeks ending July 10, 17, 24, 31 and



*Exhibit A, Annexed to Foregoing Affidavit.*

1915

August 7, 1942, he was paid at the flat rate of \$2 an hour for a 60-hour week, although he did not perform any work at all on the day shift during such weeks.

A like conclusion appears warranted with respect to the day-shift employees who are paid a similar premium rates for work performed on the night shift. While, in the normal case, the payment of a premium rate for night work to one who has also performed day work during that day is evidence that the premium is overtime, a different result obtains here because it appears that the premium compensation would have been paid even in the absence of the performance of day work by the employee on that day. See, in this connection, Floyd S. Schrider's statement and payroll transcriptions in the file.

1916

With respect to the regular day-shift employees who receive double time at night, we do not believe the facts are sufficiently clear, in the present state of the file, to enable us to definitely determine whether all or only part of that double time compensation constitutes straight-time pay under the Acts. In our opinion, the facts on this point should be further developed along the lines indicated below. The double time would be considered straight-time compensation if it is paid solely because the employee is employed on GPO work and not because he had previously performed day work that same day. In this connection it would be important to ascertain whether an employee who works only at night on a given day is paid double time when working on GPO jobs and time and one-half when working on non-GPO jobs. Similarly, it would be significant to ascertain whether an employee who has performed work during the day and is asked to work at night on non-GPO jobs that same day is paid double time or time and one-half, also, the rate paid under the same circumstances when he is employed on GPO work.

1917

The subject file is returned herewith.



1918

**Exhibit B-1, Annexed to Foregoing Affidavit.****Table 1****INCIDENCE OF ACTUAL WORK-DAY LENGTH FOR  
64 LONGSHOREMEN PLAINTIFFS IN THE  
HURON CASE\***

1919

1920

<i>No. of Hours</i>	<i>No. of Instances</i>
1½	3
2	17
2½	1
3	7
3½	23
4	114
4½	25
5	62
5½	3
6	50
6½	22
7	31
7½	31
8	153 = 6.3% of Total
8½	39
9	83
9½	21
10	427
10½	2
11	1244
11½	2
12	11
12½	1
13	28
13½	5
14	4
18½	1
19	2
20	1
21	1

**Grand Total 2414**

\* These data are derived from record transcripts submitted to plaintiffs by defendants prior to trial and include the 10 selected Huron plaintiffs. The period covered is that of the litigation.



**Exhibit B-2, Annexed to Foregoing Affidavit.****Table 3**

**DISTRIBUTION OF INSTANCES OF WORK AND  
LACK OF WORK ON EACH DAY OF WEEKS IN  
WHICH SOME WORK WAS PERFORMED BY  
64 LONGSHOREMEN PLAINTIFFS IN THE  
HURON CASE\***

	<i>Instances where employee worked</i>	<i>Instances where employee did not work</i>	
Monday .....	396	194	1922
Tuesday .....	386	204	
Wednesday .....	386	204	
Thursday .....	376	214	
Friday .....	385	205	
Saturday† .....	140	450	
Sunday .....	346	244	
<b>TOTAL .....</b>	<b>2,415</b>	<b>1,715</b>	<b>1923</b>

\* These data are derived from record transcripts submitted to plaintiffs by defendants prior to trial and include the 10 selected plaintiffs. The period covered is that of the litigation. The same data could not be compiled for Bay Ridge employees, because the record transcriptions supplied in the case of that defendant did not show breakdown of hours as between days of the week.

† Since the union contract forbids work on Saturday night, theoretically the maximum possible hours which could be worked on Saturday, including the noon meal hour, would be 9, as compared with 24 on any other day. The relation of 9 to 24 is  $37\frac{1}{2}\%$ . According to the law of mathematical possibilities, the distribution of instances worked on Saturday should, therefore, be expected to approximate  $37\frac{1}{2}\%$  of instances of work on other days. The ratio of Saturday work (140) to the average for all other days of the week (379) is 37%.



1924

**Exhibit B-3, Annexed to Foregoing Affidavit.****Table 4**

**DISTRIBUTION OF INSTANCES OF WORK ON  
SATURDAYS AND SUNDAYS ACTUALLY PER-  
FORMED AT NIGHT IN THE CASE OF  
THE TEN SELECTED PLAINTIFFS  
IN THE HURON CASE\***

	<i>Saturday</i>		<i>Sunday</i>		<i>Total</i>	
	<i>Day</i>	<i>Night</i>	<i>Day</i>	<i>Night</i>	<i>Day</i>	<i>Night</i>
1925 Blue	6		6	1	12	1
Dixon		3		44	0	47
Elliott	10		10		20	0
Fleetwood	22	3	19	3	41	6
Fuller	6		5	2	11	2
Johnson		3		60	0	63
McGee		1		49	0	50
Short	31		30	2	61	2
Steele				34	0	34
1926 Toppin		4		56	0	60
TOTAL INSTANCES					145	265

\* The source of the above is payroll data transcribed in Plaintiffs' Exhibit 7. Transcript of the same data could not be compiled for Bay Ridge employees because the record transcriptions supplied for that defendant did not show breakdown of hours as between days of the week.

In tabulating the data use has been made of the fact appearing in para. 7 of Plaintiffs' Exhibit 7 as supplemented to the effect that wherever 11 hours appears in the transcripts on any calendar day (with one exception in the case of one man in one week) this always signifies work at night. Recourse has also been had to the benefit of testimony and analysis of the record transcripts indicating that the men in the regular night gangs always worked nights. It follows that they worked nights on Saturdays and Sundays for all hours they worked on those days though less than 11.



**Order of Hon. Simon H. Rifkind Denying Motion for  
New Trial, to Open Judgment to Take Additional  
Testimony, and for Amended and Additional  
Findings of Fact.** 1927

Motion argued—April 14, 1947.

Motion denied—April 14, 1947.

SIMON H. RIFKIND  
U. S. D. J.

**Notice of Appeal,**

1928.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

---

JAMES AARON, ET AL.,

Plaintiffs,

*against*

BAY RIDGE OPERATING CO. INC.,

Defendant. 1929

SIR:

NOTICE IS HEREBY GIVEN that plaintiffs James Aaron, Albert Green and Mars Stephens hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from the final judgment in this action entered on the 28th day of March, 1947 and from each and every part thereof; and

FURTHER NOTICE IS HEREBY GIVEN that plaintiffs Albert Alston, James Brooks, Louis Carrington, James Hendrix,



1930

*Notice of Appeal.*

Austin Johnson, Carl Roper and Nathaniel Tolbert hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from the final judgment in this action entered on the 28th day of March, 1947 on the ground that the judgment was inadequate and did not represent the full amount to which they were respectively entitled.

1931

FURTHER NOTICE IS HEREBY GIVEN that all plaintiffs appeal to the United States Circuit Court of Appeals for the Second Circuit from the final order in the action dated April 14, 1947 denying plaintiffs' motion for a new trial to open the record to take additional testimony to admit additional exhibits, and for amended, corrected and additional findings of fact, and from every part thereof.

Dated, New York, N. Y., April 17, 1947.

MAX R. SIMON, Esq. and  
GOLDWATER & FLYNN, Esqs.

By JAMES L. GOLDWATER,  
A member of the firm.  
Attorneys for Plaintiffs,  
60 East 42 Street,  
New York, N. Y.

1932

To:

JOHN F. X. MCGOHEY, Esq.,  
United States Attorney,  
Attorney for Defendant,  
United States Courthouse,  
Foley Square,  
New York, N. Y.



**Notice of Appeal.**

1933

**UNITED STATES DISTRICT COURT,****SOUTHERN DISTRICT OF NEW YORK.****Civ. 33-212.****LEO BLUE, et al.,****Plaintiffs,***against***HURON STEVEDORING CORP.,**

1934

**Defendant.****SIR:**

NOTICE IS HEREBY GIVEN that plaintiffs Leo Blue, Nathaniel Dixon, Tony Fleetwood, James Fuller, Joseph J. Johnson, Sherman McGee, Alonzo Steele and Whitfield Toppin hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from the final judgment in this action entered on the 28th day of March, 1947, and from each and every part thereof; and

FURTHER NOTICE IS HEREBY GIVEN that plaintiffs Christian Elliott and Joseph Short hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from the final judgment in this action entered on the 28th day of March, 1947 on the ground that the judgment was inadequate and did not represent the full amount to which they were respectively entitled.

FURTHER NOTICE IS HEREBY GIVEN that all plaintiffs appeal to the United States Circuit Court of Appeals for the Second Circuit from the final order in the action dated April 14, 1947 denying plaintiffs' motion for a new trial to



1936

*Notice of Appeal.*

open the record to take additional testimony to admit additional exhibits, and for amended, corrected and additional findings of fact, and from every part thereof.

Dated, New York, N. Y., April 17, 1947.

MAX R. SIMON, Esq. and  
GOLDWATER & FLYNN, Esqs.

By JAMES L. GOLDWATER,  
A member of the firm.  
Attorneys for Plaintiffs,  
60 East 42 Street,  
New York, N. Y.

1937

To:

JOHN F. X. MCGOHEY, Esq.,  
United States Attorney,  
Attorney for Defendant,  
United States Courthouse;  
Foley Square,  
New York, N. Y.

1938



**Stipulation Modifying Captions as to All Pleadings in Printing of Record on Appeal. 1939**

IN THE  
DISTRICT COURT OF THE UNITED STATES,  
FOR THE SOUTHERN DISTRICT OF NEW YORK

---

JAMES AARON, ALBERT ALSTON, JAMES PHILIP BROOKS, LOUIS  
CARRINGTON, ALBERT GREEN, JAMES HENDRIX, AUSTIN  
JOHNSON, CARL I. ROPER, MARS STEPHENS and NATHANIEL  
TOLBERT,

1940

Plaintiffs-Appellants,

*against*

BAY RIDGE OPERATING Co., Inc.,

Defendant-Appellee.

---

LEO BLUE, NATHANIEL DIXON, CHRISTIAN ELLIOTT, TONY  
FLEETWOOD, JAMES FULLER, JOSEPH J. JOHNSON, SHER-  
MAN MCGEE, JOSEPH SHORT, ALONZO E. STEELE, and  
WHITFIELD TOPPIN,

Plaintiffs-Appellants, 1941

*against*

HURON STEVEDORING CORP.,

Defendant-Appellee.

---

It is hereby stipulated by and between the attorneys for the parties to the above entitled actions that in printing the record on appeal in Civil Actions Nos. 33-212 and 33-213, the captions in the pleadings and in any reference to



**1942** *Stipulation Modifying Captions as to All Pleadings in  
Printing of Record on Appeal.*

the cases which are the subject of this appeal shall read as above set out, so that there shall appear in the captions the names only of those ten plaintiffs in each case whose claims were severed out and separately tried, omitting the names of all other plaintiffs in each case.

Dated New York, N. Y., April 14, 1947.

**MAX R. SIMON and GOLDWATER & FLYNN,**

**1943**

By **JAMES L. GOLDWATER,**  
Attorneys for Plaintiffs-Appellants.

**JOHN F. X. MCGOHEY,**

By **MARVIN C. TAYLOR,**  
Attorney for Defendants-Respondents.

**1944**



**Stipulation Dispensing With Printing of Certain  
Exhibits in the Record on Appeal.**

1945

**UNITED STATES DISTRICT COURT,**

**SOUTHERN DISTRICT OF NEW YORK.**

[SAME TITLE]

IT IS HEREBY STIPULATED by and between the attorneys for the parties to the above entitled action that the following exhibits, introduced in evidence by the parties at the trial of the action, need not be reproduced in the record on appeal but the originals thereof may be sent to the United States Circuit Court of Appeals for the Second Circuit in lieu of copies thereof, or handed up on the argument of the appeal for inspection by the court as if reproduced in the record on appeal in full: (a) Plaintiffs' Exhibits 7, 8, 11, 12, 13, 15, 16, 17; (b) Defendants' Exhibits A, D, E, F, G, H, J, M.

1946

IT IS FURTHER STIPULATED AND AGREED by and between the attorneys for the parties that the foregoing exhibits shall be entrusted to the attorneys for plaintiffs for exhibition to the United States Circuit Court of Appeals for the Second Circuit upon the argument of the appeal herein and shall then be delivered to the Clerk of the Court subject to the Court's further order in regard thereto.

1947

Dated New York, N. Y., April 14, 1947.

**MAX R. SIMON and GOLDWATER & FLYNN,**

**By JAMES L. GOLDWATER,**  
**Attorneys for Plaintiffs-Appellants.**

**JOHN F. X. MCGOHEY,**

**By MARVIN C. TAYLOR,**  
**Attorney for Defendants-Respondents.**



1948

**Stipulation as to Contents of Record.****UNITED STATES DISTRICT COURT****SOUTHERN DISTRICT OF NEW YORK****[S A M E T I T L E]**

1949

The parties hereto by their respective attorneys stipulate and agree that the record on appeal of the plaintiffs from the judgment of this court rendered the 28th day of March, 1947,, shall be constituted of the portions of the record, proceedings and evidence in the case as set out herein below, such portions of the record, proceedings and evidence being designated as the record on appeal:

1950

1. Statement under Rule XV, subdivision (b).
2. Complaint in each case.
3. Answer in each case.
4. Stipulation in Civil Action No. 33-212 severing for immediate trial the claims of Leo Blue and nine other named plaintiffs against defendant Huron Stevedoring Corp. (Pl. Ex. 5).
5. Stipulation in Civil Action No. 33-213 severing for immediate trial the claims of James Aaron and nine other named plaintiffs against defendant Bay Ridge Operating Co. Inc. (Pl. Ex. 6).
6. Stipulation consolidating for trial Civil Actions Nos. 33-212 and 33-213.
7. Transcript of stenographic minutes.
8. Plaintiffs' Exhibits 5, 6, 7, 8, 11, 12, 13, 15, 16, 17, 18, 19; Defendants' Exhibits A, B, C, D, E, F, G, H, J, M, N and O.
9. Stipulation of the attorneys for the parties dispensing with the printing of certain exhibits in



*Stipulation as to Contents of Record.*

1951

the transcript of record on appeal, and permitting one copy of each to be handed up on the argument of the appeal.

10. Opinion of Hon. Simon H. Rifkind filed January 6, 1947.
11. Findings of Fact and Conclusions of Law filed March 4, 1947.
12. Judgment rendered March 28, 1947 in each case.
13. Motion for a new trial to open the record and for corrected and amended findings, with annexed affidavit and exhibits, served and filed by plaintiffs April 7, 1947. 1952
14. Order of Hon. Simon H. Rifkind denying motion to open the record and for corrected and amended findings, dated April 14, 1947.
15. Plaintiffs' notices of appeal in the respective cases, filed April 17, 1947.
16. Stipulation of the attorneys for the parties permitting the captions of all pleadings to be revised in printing the record on appeal.
17. Designation of portions of record, proceedings and evidence comprising the record on appeal (this stipulation). 1953

Dated, New York, N. Y.,  
April 14, 1947.

MAX R. SIMON and GOLDWATER & FLYNN,

By JAMES L. GOLDWATER,  
Attorneys for Plaintiffs-Appellants.

JOHN F. X. MCGOHEY,

By MARVIN C. TAYLOR,  
Attorney for Defendants-Respondents.



1954

**Stipulation Settling Record.**

UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

1955

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the District Court in the above entitled matter, as agreed upon by the parties.

Dated: <sup>May</sup> April 5, 1947.

MAX R. SIMON and GOLDWATER & FLYNN,

By JAMES L. GOLDWATER,  
Attorneys for Plaintiffs-Appellants.

JOHN F. X. MCGOHEY,

By MARVIN C. TAYLOR,  
Attorney for Defendants-Respondents.

1956



1957

**Clerk's Certificate.****UNITED STATES DISTRICT COURT,****SOUTHERN DISTRICT OF NEW YORK.**

I, WM. V. CONNELL, Clerk of the District Court of the United States of America, for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above entitled matter, as agreed upon by the parties.

1958

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed at the Borough of Manhattan, City of New York, in the Southern District of New York, this 5<sup>th</sup> day of May in the year of our Lord one thousand nine hundred and forty-seven, and of the Independence of the United States, one hundred and seventy-first.

(Seal)

WM. V. CONNELL,  
Clerk.

1959







UNITED STATES CIRCUIT COURT OF APPEALS FOR  
THE SECOND CIRCUIT

---

Nos. 272 and 273. / October Term, 1946

(Argued May 9, 1947.—Decided June 3, 1947)

Docket Nos. 20619 and 20620

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JAMES AARON, ALBERT ALSTON, JAMES PHILIP BROOKS, LOUIS  
CARRINGTON, ALBERT GREEN, JAMES HENDRIX, AUSTIN JOHNSON,  
CARL L. ROPEL, MARS STEPHENS, AND NATHANIAL TOLBERT,  
PLAINTIFFS-APPELLANTS

v.

BAY RIDGE OPERATING CO., INC., DEFENDANT-APPELLEE

---

LEO BLUE, NATHANIEL DIXON, CHRISTIAN ELLIOTT, TONY FLEET-  
WOOD, JAMES FULLER, JOSEPH J. JOHNSON, SHERMAN MCGEE,  
JOSEPH SHORT, ALONZO E. STEELE, AND WHITFIELD TOPPIN,  
PLAINTIFFS-APPELLANTS

v.

HURON STEVEDORING CORP., DEFENDANT-APPELLEE

---

Before: SWAN, AUGUSTUS N. HAND, AND FRANK, Circuit Judges

Appeals by the plaintiffs from judgments entered by the United States District Court for the Southern District of New York in two actions consolidated for purposes of trial, insofar as the judgments are adverse to plaintiffs. Reversed and Remanded.



MAX R. SIMON AND GOLDWATER & FLYNN (Monroe Goldwater, Max R. Simon, James L. Goldwater, and Joseph E. O'Grady, of counsel) for plaintiffs-appellants

JOHN F. X. MCGOHEY, JOHN F. SONNETT, J. FRANCIS HAYDEN, MARVIN C. TAYLOR AND MARY L. SCHLEIFER, for defendants-appellees

The opinion of the trial court is reported in 69 Fed. Supp. 956.

FRANK, Circuit Judge.

Section 7 (a) of the Fair Labor Standards Act (29 U. S. C. A. § 201 *et seq.*) provides: "No employer shall \* \* \* employ any of his employees \* \* \* for a workweek longer than forty hours \* \* \* unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed. The fundamental question before us here turns on the interpretation of "regular rates." Since ours is but an intermediate court, of course, in construing those words we are bound by the pertinent decisions of the Supreme Court.

These appeals are from judgments to the extent that they are adverse to plaintiffs, longshoremen working in the Port of New York, who maintain that defendants violated the Act by not paying plaintiffs one and one-half times the "regular rate" for hours, in certain workweeks, in which plaintiffs worked for defendants in excess of forty hours. It is urged by the defendants that the "regular rate" is controlled by provisions of collective bargaining agreements between the defendants and the union, International Longshoremen's Association, to which plaintiffs belonged in the years in question. The annual collective agreements made with this union since 1921 have provided for a "basic working day" of eight hours and a "basic working week" of forty-four hours. Beginning in 1918, these agreements fixed two sets of hourly rates: (1) Specified hourly rates were set for "work performed from 8 a. m. to 12 noon and from 1 p. m. to 5 p. m., Monday to Friday inclusive, and from 8 a. m. to 12 noon Saturday." (2) With a few exceptions, one and one-half times these rates, were fixed for what the agreements called "all other time." In the Fall of 1938, after the enactment of the Fair Labor Standards Act, the agreement changed the labels for these respective periods: The first was now



called "straight time"; the second was now called "overtime," the rates for that period being newly described as "overtime rates." This nomenclature was thereafter used in the agreements and is contained in the agreements for the years involved in these suits. No other significant changes were made in the agreements after the Act went into effect.<sup>1</sup>

During the years 1943-1945, here involved, in most instances the defendants applied the terms of these agreements in paying the plaintiffs. As a result, if one of the plaintiffs in a given week worked, say, fifty hours during the so-called "overtime" period, he received for the excess ten hours precisely the same rate per hour as he was paid for the forty hours; that is, he received merely the contract rate—called the "overtime rate" in the contract—for all the fifty hours. If, in a given workweek, he worked thirty hours during the so-called "straight time" period and twenty hours in the so-called "overtime" period, again he received merely the

<sup>1</sup> One change is noted in the trial court's Findings 33 and 43a, which appear in the Appendix to this opinion.

The agreement contained the following "wages scale":

"4. Wage Scale: The wage scale shall be as follows:

General cargo agreement	Straight time	Overtime
(a) General Cargo of every description including barrel oil when part of General Cargo, and all General Cargo handled in refrigerator space with the temperature above freezing.....	\$1.25	\$1.87½
(b) Bulk Cargo, ballast, and all coal cargoes, including loading and trimming coal for a ship's own bunker purposes.....	1.30	1.92½
(c) Cement in bags.....	1.30	1.92½
(d) Wet hides, creosoted poles, creosoted ties, creosoted shingles, and soda ash in bags.....	1.40	2.02½
(e) Refrigerator space cargo—meats, fowls, and other similar cargo—which is to be transported with the temperature in the refrigerator at freezing or lower; these rates shall be paid the full gang.....	1.45	2.07½
(f) Kerosene, gasoline and naphtha in cases and barrels, when loaded by case oil gangs, and with a fly.....	1.45	2.17½
(g) Explosives.....	2.50	3.75
(i) When handled down the Bay, the time shall start from the time when men leave the pier until the time they return to pier.		
(ii) When handled down the Bay, men shall supply their own meals, but \$1.00 per meal shall be allowed by the employer.		
(iii) When explosives, such as are customarily handled down the Bay are handled at any pier, men shall be paid at the Explosive rate of pay.		
(iv) Any dispute as to what explosives are, shall be settled by the Bureau of Explosives whose decision shall be final and shall be accepted by both sides.		
(h) Damaged Cargo.....	\$2.50	\$3.75
(i) All cargo damaged by either fire or water, when such damage causes unusual distress or obnoxious conditions, and, also, in all cases where men are called upon to handle cargo in the ship under distress conditions.		
(ii) The damaged cargo rates shall not be paid when sound cargo in a separate compartment is handled."		



contract rates; that is, for the excess ten hours, he received merely the contractually labelled "overtime rate."<sup>2</sup>

The trial judge held this method of payment correct, on the ground that the rates fixed in the agreements for the "straight time" period constituted the "regular rate" referred to in § 7 (a) of the Act.<sup>3</sup> In so deciding, he relied on *Walling v. Belo Corp.*, 316 U. S. 624. We think he erred. As recently as May of this year, the Supreme Court, in a unanimous opinion by Chief Justice Vinson—confirming what had been said previously by this Court and by several other inferior courts<sup>4</sup>—decided that the *Belo* case doctrine must be limited to agreements which contain a "provision for a guaranteed weekly wage with a stipulation of an hourly rate," and that other types of agreement, whether or not the result of collective bargaining, cannot, by their terms, determine what is the "regular rate" named in the Act. That "regular rate," said the Court, is an "actual fact." See *149 Madison Avenue Company v. Asselta*, U. S. (May 5, 1947), citing *Walling v. Youngerman Reynolds Hardwood Co.*, 325 U. S. 419, 424. See also *Walling v. Helmerich & Payne*, 323 U. S. 37.

In the instant case, the "actual fact" concerning the "regular rate" appears in the findings of the trial judge which are supported by the evidence and which we understand the defendants do not dispute. In an Appendix to this opinion, we have set forth pertinent portions of those findings.

Because government counsel, appearing for the defendants,<sup>5</sup> have earnestly asserted the grave precedential importance of these appeals, and because of our respect for the able trial judge, we have considered his opinion with unusual care. None of us, however, is able to agree with that opinion. We conclude that the judgments, insofar as they are adverse to the plaintiffs, must be reversed.

Faced with substantially similar collective bargaining agreements and with facts in many respects the same, the Seventh Circuit in 1944 reached a conclusion like ours, as to longshoremen in the Great Lakes area; see *Cabunac v. National Terminals Corp.*, 139 F. (2d) 953 (affirming the able opinion of Judge Duffy, *sub*

<sup>2</sup> These are suppositious examples, but they illustrate, in simple form, what actually occurred.

<sup>3</sup> As a consequence, one of his conclusions of law reads: "The 'straight time hourly rate set forth in each . . . collective Agreement . . . constituted the regular rate at which plaintiffs were employed."

<sup>4</sup> Defendants incorrectly state in their brief that the foregoing was a finding of fact. *Walling v. Uhlmann Grain Co.*, 151 F. (2d) 381, 383 (C. C. A. 7); *Walling v. Alaska Pacific Consol. Min. Co.*, 152 F. (2d) 812, 815 (C. C. A. 9); *Asselta v. 149 Madison Ave. Corp.*, 156 F. (2d) 139 (C. C. A. 2); *Walling v. Richmond Screw Anchor Co.*, 154 F. (2d) 766, 764 note 4 (C. C. A. 2).

<sup>5</sup> In oral argument we were told that government counsel were the sole counsel for defendants here because the United States will ultimately pay any judgment against defendants, due to war-time "cost-plus" contracts between the United States and the defendants.



*nom, International Longshoremen's Association v. National Terminals Corp.*, 50 F. Supp. 26). Judge Cooper, a few months ago, also reached this conclusion as to longshoremen working in Puerto Rico, in a case in which, as here, government counsel represented the employer and apparently advanced the very arguments advanced here. See *Ferren v. Waterman S. S. Corp.*, 70 Fed. Supp. 1.

We cannot agree with the argument that our conclusion is unsound because it may require separate computations for each week at rates which may vary from week to week. In *Overnight Motor Transport Co. v. Missel*, 316 U. S. 572, 580, the Court said that compensation capable of reduction to an hourly basis by application of a uniform principle is "regular in the statutory sense, inasmuch as the rate per hour does not vary for the entire week, though week by week the regular rate varies with the number of hours worked." We take this statement as meaning that the statutory element of regularity is met where a single principle or rule is uniformly applied in order to obtain the rate.<sup>6</sup>

We think that the administrative interpretations suggest no conclusion different from ours.<sup>7</sup> The one conceivable exception has to do with Sunday and holiday work. In a letter of May 14, 1943, discussing the Cleveland Stevedore Co., the Administrator said that "overtime compensation for Sunday or holiday work \* \* \* may be credited toward overtime due under the Act," because "it can be regarded as time outside the employee's normal working hours"; but we must also consider the following: (1) The day after that letter of May 14, 1943, was written, Judge Duffy held the contrary; see *International Longshoremen's Association v. National Terminal Corp.*, 50 F. Supp. 26, affirmed in 139 F. (2d) 853 (C. C. A. 7). (2) In an opinion published in the *Wage & Hour Manual*, 1944-45 Cum. Ed. page 227, the Assistant Solicitor referred to a previous ruling, in the Administrator's Interpretative Bulletin No. 4, that an employer might consider "as overtime compensation only if the 'hours compensated for' were hours worked outside the normal or regular working hours"; the

<sup>6</sup> The trial judge, speaking of the difficulty of ascertaining the amounts due if "once you cut loose from the anchor of the agreement," said, "an employee's compensation would vary depending upon whether he worked for one employer or more than one, in the course of a single week": 69 F. Supp. at 960. But see, on this very point, *Walling v. Toyco, Inc.*, 158 F. (2d) 944, 947 (C. C. A. 2) as to employment during the same week of a single employee by several different employers.

<sup>7</sup> Indeed, they support plaintiffs' contentions. Thus paragraph 69 of Interpretative Bulletin No. 4 says that "in determining whether he has met the overtime requirements of section 7 the employer may properly consider as overtime compensation paid by him for the purpose of satisfying these requirements, only the extra amount of compensation—over and above straight time—paid by him as compensation for overtime work—that is, for hours worked outside the normal or regular working hours—regardless of whether he is required to pay such compensation by a union or other agreement." (The italics are as in the original.)

Perhaps because of the government's financial interest in these cases, the Administrator on these appeals did not follow his frequent practice of filing (with our permission) a brief amicus, discussing his interpretations.



opinion said that such extra compensation might be considered overtime compensation only if the "hours compensated for were 'hours not normally worked by the employees' giving as an example 'work on Sundays, holidays, or at a time of day when the employee does not normally work'; the opinion, however, went on to explain that 'hours worked on Sundays and holidays are generally outside the 'normal or regular working hours.' " In the instant cases, on the facts disclosed in the findings,<sup>8</sup> the hours worked on Sunday afternoons, Sundays and holidays were surely not "outside the normal or regular working hours."

It is suggested that, if the contractual "straight time" rate is not the "regular rate," then that rate for any employee in any week must be ascertained by averaging the rates paid for the first forty hours of work in that week. But in *Walling v. Halliburton Oil Well Cementing Co.*, U. S. (April 14, 1947), the Court stated that "in *Overnight Motor Co. v. Missel*, 316 U. S. 572, we held that the regular rate was to be determined by dividing the wages actually paid by the hours actually worked." See also *Ferren v. Waterman S. S. Co.*, *supra*; cf. *Walling V. Schollhorn*, 54 F. Supp. 1022.

The Administrator's Press Release 1913 stated that theretofore, where an employee received more than one rate during a workweek, the Administrator had ruled that the employer must pay the employee an "overtime rate of one and one-half his average hourly earnings for the entire week, computed by dividing the weekly earnings at both rates by the total number of hours worked in the week," but that thereafter an employer would have an option, in the alternative, to compute the overtime rate at one and one-half times the rate at which the employee worked during the hours in excess of forty. However, this Release was later qualified by Press Release 1913 A, which stated, "In order to take advantage of this [revised] rule, the records of the employer must show which method of computing overtime compensation he had determined to follow." Nothing in the evidence here indicates that either defendant so kept its records.

Counsel for plaintiffs are allowed \$2,000.00 for their services on these appeals.<sup>9</sup>

Reversed and remanded for determination of the amounts due plaintiffs in accordance with this opinion.

<sup>8</sup> See the Appendix to this opinion, especially Findings 19, 20, 34, 35 and 46. See also 69 F. Supp. at 960, note 2.

<sup>9</sup> Of course, the district court will, in addition, make allowances for the services in that court.



## APPENDIX

**Findings of Fact No. 14:** In the longshore industry in the Port of New York there are no regular or usual hours of work. Employment is highly casual in character, more so than employment in any other major industry. This condition is primarily the product of the uncertainties of maritime, shipping and weather conditions, the unpredictable character of ship and overland cargo arrivals and the use of the 'shape' as a hiring device, as defined in Finding No. 16. The casual character of the work is reflected both in the difficulty of finding employment, the irregularity of the hours of beginning and stopping work, and in the uncertainty of the duration of employment during any specified period. In these respects the work pattern of longshoremen is unique.

**"No. 15:** During the period in suit, and for many years prior thereto, longshoring in the Port of New York has had the following characteristics. With rare exceptions, longshoremen do not work regularly or continuously for any one stevedoring company, but shift from employer to employer and from pier to pier as casual workers, working when they want, and when and where work is available. There is no regular weekly or even daily, employment. Longshoremen may work for more than one employer in a single day, or during the same week. The total number of hours worked in any day or week varies widely. Irregularity of both daily and weekly hours is characteristic of the industry.

**"No. 16:** Employment of Longshoremen is wholly dependent upon the selection of men at one or another of the 'shapes' at the head of each pier where work is to be done. At three stated hours during the day, namely, at 7.55 a. m., 12.55 p. m. and 6.55 p. m., men seeking employment gather in a group or semicircle, constituting the 'shape,' at the head of a pier where work is available. The foreman stevedore then selects from the 'shape' such men as he desires to hire to work until 'knocked off,' that is, told to quit. The selection of a man from the shape carries with it no obligation on the part of the employer concerning any specified length of employment, except for work requirements of the Collective Agreement relating to minimum hours under specified conditions. The duration of employment depends entirely upon the determination of the stevedore or the steamship company. Where longshoremen work during 'straight time' hours, it is customary for the employer to defer until about 4.30 p. m. his decision as to whether the men shall do work after 5 p. m. If it seems likely that night work will be required, the employer may definitely engage the men, or he may order them to shape at 6.55 p. m. If the men are directed to shape at 6.55 p. m., and the employer then decides not to work that night, because of weather conditions or other



circumstances relating to the arrival or handling of cargo, he is at liberty not to hire any man at the 6.55 p. m. shape, and thereby he incurs no obligation for compensation. At times the men have been directed to shape up at hours other than the three specified shape hours hereinabove mentioned.

"No. 17: When men have been selected individually at the shape, they are organized into gangs of about 20 men, in charge of a foreman, and put to work loading or unloading a ship. Where a gang has been accustomed to work as a group, it is assigned to a particular hatch or job. A gang may hold together for a few hours, or it may operate as a unit as long as there is work in the hatch or ship, which may be for less than a day or for more than a week. They may, and sometimes do, work as a group on frequent occasions for one employer, being employed regularly or steadily. The men are employed only when there is work to be done. At the end of a working period a gang may be told to 'knock off,' in which event the men would shape again at a later shaping hour, or on the next day, if they so desired, if work was available at the pier.

"No. 18: During the period in suit, the defendants in some instances adopted the practice of posting notices on bulletin boards of the arrival of ships, or of calling gangs, working customarily together, by a prior notice posted at the pier or by telephonic communication from the stevedoring foreman to the gang leader or hatch boss, and from him, in turn, to the individual men. This practice, however, did not bring about a departure from the established custom that the men shape up at the customary times, regardless of whether they had been working at that pier on the previous day or even earlier the same day.

"No. 19: The amount of work which may be available for longshoremen in the Port of New York, and the time of the day or the day of the week when such work may be available, depend principally upon the number of ships in port and the length of their stay, and varies from day to day, week to week, and season to season.

"No. 20: Under the terms of the Collective Agreement in effect during the period in suit, and under previous Collective Agreements in effect over a period of many years, the longshoremen in the Port of New York have been obligated to work any night of the week or on Sundays, holidays or Saturday afternoons, when directed, with special limitations on Saturday nights.

"No. 22: The stevedoring business in the Port of New York prior to World War II, had the following characteristics: About seven or eight stevedoring companies worked for one steamship company each, whereas about 60 other stevedoring companies, known as contracting stevedores, worked for a number of steam-



ship lines. Before a ship docked in this port, the stevedores knew the vessel's definite or approximate date of departure and also the type of cargo to be discharged or loaded. Thereupon, they made a determination concerning the best way of handling the cargo at the lowest possible cost. Tentative plans for the handling of the cargo were readjusted from time to time on account of delayed arrival, necessity for repairs, delay in arrival of outgoing freight, weather conditions and other factors.

"Stevedoring companies never worked any more 'overtime' than was necessary, because it was more economical for the steamship company, and more profitable to the stevedores, to work during 'straight time' hours. It was the common practice for stevedoring companies to use auxiliary equipment, and to work the largest number of day gangs within the vessels' limitations of space and equipment. Permission to work 'overtime' had to be obtained by the stevedoring company from the steamship company. The decision whether to work 'overtime' was controlled by the necessity of meeting scheduled sailing dates in the case of passenger liners, and otherwise by financial considerations turning on whether the over-all cost of a later departure exceeded the cost of 'overtime.' The contract between stevedoring companies and steamship lines usually provided that the former would be paid on a tonnage basis, plus the actual cost of 'overtime', including 'overtime' differentials, insurance and Social Security taxes. For the most part, the longshoremen preferred to work during the daytime rather than during the night. The amount of 'overtime' that the men worked depended to a considerable extent upon the stevedoring companies by whom they were employed.

"No. 25: The steamship companies in the Port of New York have preferred to confine the handling of cargo to 'straight time' hours to the greatest possible extent. They give permission to work 'overtime' when such work is unavoidable. The 50-percent over-riding charge for work done during 'overtime' hours is a deterrent because of the added cost and the intensity of the competition between American ships and ships of foreign registry.

"No. 26: Stevedoring companies try to avoid working 'overtime' hours. Their contracts are entered into on a commodity tonnage basis. When permission is granted to work 'overtime,' stevedores receive in addition to the commodity tonnage rate only the actual additional amounts paid out in wages, plus insurance and Social Security tax. 'Overtime' work is less efficient than work in 'straight time' hours. These factors contribute to the reduction of the stevedore's profits, if his employees are worked 'overtime.'

"No. 30: Night work, Sunday work, work on Saturday afternoons and on certain legal holidays, have been compensated at rates



higher than the prevailing day rates in the longshore industry in the Port of New York at least as far back as 1887.

"No. 33: In the Fall of 1938, after the enactment of the Fair Labor Standards Act, the Collective Agreement for the longshoremen's industry in the Port of New York introduced, with reference to work at night, Saturday afternoons, Sundays, and Holidays, on general cargo, the terms 'overtime' and 'overtime which shall be paid for at the overtime rate.' The parties, nevertheless, from the passage of the Fair Labor Standards Act through the period in suit, made no actual change in the general manner of compensating longshoremen as compared with that prevailing previously, except under the circumstances noted in Finding No. 43 (a).

"No. 34: During most of the period in suit the defendants required some longshore work practically around the clock, day in and day out, except Saturday nights. Defendant Huron employed some groups exclusively on night work. Defendant Bay Ridge assigned its gangs either to day or night work as shipping exigencies required, and its gangs frequently commingled day work with night work on different days in the same working week.

"No. 35: No stevedoring company worked exclusively from 8 a. m. to 5 p. m. and Saturday mornings. Even prior to World War II some stevedoring companies had fairly regular recourse to some night work.

"No. 36: During the period in suit defendants endeavored to have longshoremen available for work in regular gangs which were called out by defendants to shape up as shipping exigencies required. Some of the plaintiffs normally sought employment at other piers only when they could not get work at the piers served by the defendants sued herein. Even when ordered out by defendants, however, the gangs were required to shape up in the customary manner and no man had assurance of employment or guarantee of its duration, except for the provisions of the Collective Agreements for minimum hours of pay under specified conditions of employment.

"No. 41: An examination of the employment record of each of the plaintiffs shows that their work followed no regular pattern. There were many weeks during which they were not employed by the defendants. They worked varying numbers of days in different weeks. The number of hours worked on the days when they did work varied greatly. Many weeks they worked less than 40 hours; other weeks more than 40 hours. They handled a variety of cargoes, and some of them worked at various times as headers, gangwaymen or assistant foremen.

"No. 42: During the period in suit the defendants paid plaintiffs the 'straight time hourly rate' for work performed during the



contract 'straight time' hours and the 'overtime hourly rate' for work performed during the contract 'overtime' hours, plus the customary differentials for work performed as headers, gangwaymen and assistant foremen. These rates were paid by the defendants regardless of whether plaintiffs worked more or less than 40 hours a week, with the single exception stated in Finding No. 43 (a).

"No. 43 (a). If, and only if, a longshoreman worked more than 40 hours between 8 a. m. and 12 noon, and 1 p. m. and 5 p. m. on Mondays to Fridays, inclusive, and between 8 a. m. and 12 noon on Saturday of that workweek, none of these days being a holiday, he was paid an additional sum for work on Saturday morning in excess of 40 hours—namely 62½ cents per hour, plus, when applicable, the differentials mentioned in Finding No. 11; however, he was not paid an additional 50 percent of the differentials."

"(b) A longshoreman who worked on general cargo in excess of 40 hours a week, all of his working hours being 'overtime' hours, was paid the 'overtime' hourly rate of \$1.87½ an hour, for all hours both within and beyond 40.

"(c) A longshoreman who worked on general cargo 40 hours or more during 'overtime' hours, and also worked on Saturday from 8 a. m. to 12 noon during the same workweek, received \$1.87½, the 'overtime hourly rate,' for the 'overtime' hours, and \$1.25, the 'straight time hourly rate,' for the Saturday hours.

"(d) A longshoreman who worked on general cargo for eight hours on Monday, from 8 a. m. to 5 p. m., and ten 'overtime' hours during each of the following four days and also on Saturdays from 8 a. m. to noon, received compensation at the 'straight time' rate for Monday and Saturday, and the 'overtime' rate for the other hours.

"(e) A longshoreman who worked on general cargo for 40 hours or less during the week, all of these hours being within the 'overtime' classification, was paid the 'overtime hourly rate' of \$1.87½ per hour.

"No. 44: During the period in suit, the plaintiffs, if they so desired, worked Sundays and Holidays whenever work was available to them, just as any other day.

"No. 45: The 'basic working day' and the 'basic working week' referred to in the Collective Agreement were not the working day

\*Finding 11 reads: "In addition to the wage scale provided for in the Collective Agreement, longshoremen, including the plaintiffs, whenever assigned by stevedores, including the defendants, to perform a specified part of the work calling for additional responsibility, were paid, by custom, additional compensation, called heading differentials, as follows: 5 cents per hour for work as a 'header.' (A header is a longshoreman who is in charge of a group of men, usually four, working in the hold of the ship); 5 cents per hour for work as a 'gangwayman.' (A gangwayman is a longshoreman who is in charge of a group of men, usually four, working on deck); and 15 cents per hour for working as an assistant foreman. These rates of additional payment were not increased when the employee worked in excess of 40 hours or during 'overtime' hours."



or working week normally, regularly or usually worked by plaintiffs during the period in suit.

"No. 46: During the period in suit, it was not unusual for the plaintiffs, in their employment by defendants, to start their work on a ship at night rather than by day, and it was not unusual to start their work on Saturday afternoon or Sunday."

United States Circuit Court of Appeals, Second Circuit

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 3rd day of June one thousand nine hundred and forty-seven.

Present: Hon. THOMAS W. SWAN, Hon. AUGUSTUS N. HAND, Hon. JEROME N. FRANK, Circuit Judges.

JAMES AARON, ET AL., PLAINTIFFS-APPELLANTS

v.

BAY RIDGE OPERATING CO., INC., DEFENDANT-APPELLEE

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed with costs and cause remanded for determination of the amounts due plaintiffs in accordance with the opinion of this court.

Furthermore ordered that counsel for plaintiffs be and hereby are allowed \$2,000.00 for their services on this and the accompanying appeal in *Leo Blue, et al., v. Huron Stevedoring Corp.*

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

ALEXANDER M. BELL, Clerk.



United States Circuit Court of Appeals, Second Circuit

JAMES AARON, ET AL.

v.

BAY RIDGE OPERATING CO., INC.

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### JUDGMENT

United States Circuit Court of Appeals, Second Circuit

(Filed June 3, 1947)

ALEXANDER M. BELL, *Clerk.*

United States Circuit Court of Appeals, Second Circuit

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 3d day of June one thousand nine hundred and forty-seven.

Present: Hon THOMAS W. SWAN, Hon. AUGUSTUS N. HAND, Hon. JEROME N. FRANK, Circuit Judges.

LEO BLUE, ET AL., PLAINTIFFS-APPELLANTS

v.

HURON STEVEDORING CORP., DEFENDANT-APPELLEE

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed with costs and cause remanded for determination of the amounts due plaintiff in accordance with the opinion of this court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

ALEXANDER M. BELL, *Clerk.*



## United States Circuit Court of Appeals, Second Circuit

LEO BLUE, ET AL.

v.

HURON STEVEDORING CORP.

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## JUDGMENT

United States Circuit Court of Appeals, Second Circuit

(Filed June 3, 1947)

ALEXANDER M. BELL, *Clerk.*

United States Circuit Court of Appeals for the Second Circuit

Civil 33-213

JAMES AARON, ALBERT ALSTON, JAMES PHILIP BROOKS, LOUIS  
CARRINGTON, ALBERT GREEN, JAMES HENDRIX, AUSTIN JOHNSON,  
CARL I. ROPER, MARY STEPHENS, AND NATHANIEL TOLBERT,  
PLAINTIFFS-APPELLANTS

v.

BAY RIDGE OPERATING CO., DEFENDANT-APPELLEE

Civil 33-212

LEO BLUE, NATHANIEL DIXON, CHRISTIAN ELLIOTT, TONY FLEET-  
WOOD, JAMES FULLER, JOSEPH J. JOHNSON, SHERMAN MCGEE,  
JOSEPH SHORT, ALONZO E. STEELE, AND WHITFIELD TOPPIN,  
PLAINTIFFS-APPELLANTS

v.

HURON STEVEDORING CORP., DEFENDANT-APPELLEE

*Petition for rehearing and to shape mandate or, in the alternative,  
for a stay of mandate*

I

The defendant-appellee respectfully petitions that the Court grant it a rehearing in each of the above entitled appeals. As grounds for this request the defendant-appellee respectfully alleges that the Circuit Court erred:



(a) In holding that the decision of the District Court was based solely on the case of *Walling v. Belo Corp.*, 316 U. S. 824, and that that decision is inapplicable on the ground that the Supreme Court, in the case of *Walling v. Halliburton Oil Well Cementing Co.*, U. S. (April 14, 1947), limited the force and effect of the *Belo* case to agreements which contain a provision for a

guaranteed weekly wage with a stipulation of an hourly rate.

(b) In holding that the cases of *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, and *Walling v. Helmerich and Payne*, 323 U. S. 37, establish a doctrine that "regular rate", within the meaning of those words in Section 7 of the Fair Labor Standards Act, is to be determined solely upon the basis of the amounts of money actually received by an employee during a particular workweek.

(c) In failing to recognize the applicability to this case of the holdings of the Supreme Court that "regular rate" is the amount actually received *exclusive of overtime*. See *Walling v. Har-nischfeger Corp.*, 325 U. S. 427, 430; *Walling v. Youngerman-Reynolds Hardwood Corp.*, 325 U. S. 419, 424; *United States v. Rosenwasser*, 323 U. S. 360, 363.

(d) In failing to give due weight to the provisions of the collective bargaining agreements pursuant to which the plaintiffs were employed and paid, and in deciding that their contractual establishment of a basic or regular rate and overtime rates is legally ineffective.

(e) In citing as supporting authority the case of *Cabunac v. National Terminals Corp.*, 139 F. (2d) 953, which arose under a collective bargaining agreement and under employment and payment practices completely dissimilar to those in these cases.

(f) In citing as supporting authority the case of *Ferrer v. Waterman S. S. Corp.*, 70 F. Supp. 1; the trial court in that case having decided that the terms of the collective bargaining agreement there involved were controlling upon it, and having based its decision upon an erroneous interpretation of the contract.

(g) In holding that the Wage and Hour Administrator's Interpretative Bulletin No. 4 does not support the defendant's position.

(h) In holding that there can be no true overtime in an industry in which irregular hours are worked, notwithstanding the fact that there has long existed in the industry a bona fide contractual arrangement, under which there is established a normal or basic workday of 8 hours and a normal or basic workweek of approximately 40 hours with time-and-a-half pay for all work performed outside the basic day or in excess of the weekly maximum and notwithstanding the fact that the practice under said contract, since the enactment of the Fair Labor Standards Act, has



been to confine the work as closely as possible to the 8-hour basic day and the weekly maximum fixed by the statute.

(i) In failing to decide how true overtime may be identified, and the relationship between payments of true overtime and the obligation of employers under Section 7 (a) of the Fair Labor Standards Act.

## II

The argument in this Court occurred on May 9, 1947. The Portal-to-Portal Act of 1947 became effective on May 14, 1947. If this petition for rehearing is denied, or if following rehearing the Court adheres to its present decision, the defendant respectfully petitions that the mandate to the District Court direct it to allow the defendant to amend its answer for the purpose of pleading defenses under Sections 9 and 11 of the Portal-to-Portal Act of 1947, and of presenting evidence in support of such amended answers.

With respect to the propriety of this request, see the appended copy of the orders of the Supreme Court of the United States, dated June 16, 1947, in *Alaska Juneau Gold Mining Co. v. Robertson*, October Term 1946, No. 836; and *149 Madison Avenue Corporation v. Asselta*, October Term 1946, No. 497. See also *Carpenter v. Wabash Railway Co.*, 309 U. S. 23, 26-27; *American Foundries v. Tri-City Council*, 257 U. S. 184, 201; *Watts, Watts & Co. v. Unione Austriaca*, 248 U. S. 9, 21.

## III

If the foregoing petitions are denied, the defendant moves that the Court stays its mandate to the District Court in each of the above-named appeals, inasmuch as the defendant-appellee intends in such event to apply for a writ of certiorari to the Supreme Court of the United States.

Dated: New York, N. Y., June 17, 1947.

JOHN F. X. MCGOHEY,  
*United States Attorney,*

PEYTON FORD,  
*Assistant Attorney General,*

J. FRANCIS HAYDEN,  
*Special Assistant to the Attorney General,*

MARVIN C. TAYLOR,  
*Special Attorney, Department of Justice,*

MARY L. SCHLEIFER,  
*Labor Law Counsel, Maritime Commission,*  
*Attorneys for Defendant-Appellee.*



## Certificate of Counsel

The undersigned, of counsel for the defendant, hereby certifies that the foregoing petitions are presented in good faith and not for purposes of delay.

MARVIN C. TAYLOR.

## APPENDIX

Orders entered by the Supreme Court of the United States on June 16, 1947.

*Alaska Juneau Gold Mining Co. v. Robertson*, October Term 1946, No. 836:

*Per curiam* "The petition for rehearing is granted. The order entered May 12, 1947, denying certiorari, is vacated and the petition for writ of certiorari is granted limited to the question presented by the petition for rehearing as to the effect of the Portal-to-Portal Act of 1947, approved May 14, 1947.

"The judgment of reversal of the Circuit Court of Appeals is modified so as to provide that on demand to the District Court that court shall have authority to consider any matters presented to it under the Portal-to-Portal Act of 1947."

*149 Madison Avenue Corporation v. Asselta*, October Term 1946, No. 497:

"On consideration of the motion of counsel for the petitioner to modify the judgment of this Court in this case, it is ordered that the judgment of affirmance entered herein on May 5, 1947, be modified so as to provide that the judgment of the Circuit Court of Appeals is affirmed and the cause is remanded to the District Court with authority in that court to consider any matters presented to it under the Portal-to-Portal Act of 1947, approved May 14, 1947."

United States Circuit Court of Appeals, for the Second Circuit

JAMES AARON, ET AL., PLAINTIFFS-APPELLANTS

v.

BAY RIDGE OPERATING CO., INC., DEFENDANT-APPELLEE

LEO BLUE, ET AL., PLAINTIFFS-APPELLANTS

v.

HURON STEVEDORING CORP., DEFENDANT-APPELLEE

Before: SWAN, AUGUSTUS N. HAND, and FRANK, Circuit Judges.

*On Petition for Rehearing*

John F. X. McGohey, Peyton Ford, J. Francis Hayden, Marvin C. Taylor and Mary L. Schleifer, for defendant-appellee.



Per Curiam:

The petition for rehearing is denied. Our decision remanding the suits should be interpreted to permit the district court to consider any matters presented to it under the Portal-to-Portal Act of 1947. We do not now, however, determine the scope or validity of any portions of that Act, since those matters have not been argued on these appeals.

T. W. S.  
A. N. H.  
J. N. F.

C. JJ.

Dated June 18, 1947.

Filed June 24, 1947.

United States Circuit Court of Appeals, Second Circuit

(Filed June 24, 1947)

ALEXANDER M. BELL, *Clerk.*

United States Circuit Court of Appeals, Second Circuit

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the city of New York, on the 24th day of June, one thousand nine hundred and forty-seven.

Present: Hon. THOMAS W. SWAN, Hon. AUGUSTUS N. HAND, Hon. JEROME N. FRANK, Circuit Judges.

JAMES AARON, ET AL., PLAINTIFFS-APPELLANTS

v.

BAY RIDGE OPERATING Co., INC., DEFENDANT-APPELLEE

LEO BLUE, ET AL., PLAINTIFFS-APPELLANTS

v.

HURON STEVEDORING CORP., DEFENDANT-APPELLEE

A petition for a rehearing having been filed herein by counsel for the defendant-appellee,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

ALEXANDER M. BELL, *Clerk.*



## United States Circuit Court of Appeals, Second Circuit

JAMES AARON, ET AL.

BAY RIDGE OPERATING CO., INC.

LEO BLUE, ET AL.

HURON STEVEDORING CORP.

## ORDER

United States Circuit Court of Appeals, Second Circuit

(Filed June 24, 1947)

ALEXANDER M. BELL, *Clerk.*UNITED STATES OF AMERICA,  
*Southern District of New York:*

I, Alexander M. Bell, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 685, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of James Aaron, Albert Alston, James Philip Brooks, Louis Carrington, Albert Green, James Hendrix, Austin Johnson, Carl I. Koper, Mars Stephens and Nathaniel Tolbert, Plaintiffs-Appellants, against Bay Ridge Operating Co., Inc., Defendant-Appellee. Leo Blue, Nathaniel Dixon, Christian Elliott, Tony Fleetwood, James Fuller, Joseph J. Johnson, Sherman McGee, Joseph Short, Alonzo E. Steele, and Whitfield Toppin, Plaintiffs-Appellants, against Huron Stevedoring Corp., Defendant-Appellee, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 18th day of August in the year of our Lord one thousand nine hundred and forty-seven, and of the Independence of the said United States the one hundred and seventy-second.

[SEAL]

(S) ALEXANDER M. BELL, *Clerk.*







Supreme Court of the United States

No. 366, October Term, 1947

*Order allowing certiorari*

Filed November 10, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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